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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA	*
	*
v.	* 06-CV-354-PB
	* November 4, 2008
GENERAL ELECTRIC COMPANY	* 9:25 a.m.
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TRANSCRIPT OF BENCH TRIAL - DAY ONE
MORNING SESSION
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government:	Catherine A. Fiske, Esq. Peter M. Flynn, Esq. Laura J. Rowley, Esq. Donald G. Frankel, Esq. U.S. Department of Justice
For the Defendant:	Peter A. Biagetti, Esq. William M. Cowan, Esq. Mintz, Levin, Cohen, Ferris, Glovsky & Popeo, PC Ignacia Moreno, Esq. Thomas H. Hill, Esq. General Electric Company
Court Reporter:	Susan M. Bateman, CSR, RPR, CRR Official Court Reporter United States District Court 55 Pleasant Street Concord, NH 03301 (603)225-1453

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1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for
3 consideration a bench trial, day one, in United States
4 of America versus General Electric Company, civil case
5 number 06-CV-354-PB.

6 THE COURT: Are we in agreement here that the
7 only issue that I need to resolve at this stage of the
8 proceedings is whether the government can establish
9 more likely than not that GE otherwise arranged for
10 the disposal of at least some of the Pyranol that had
11 transferred to Fletcher?

12 MR. FLYNN: Yes, your Honor.

13 MR. BIAGETTI: Agreed.

14 THE COURT: That's the only issue I needed to
15 resolve here. Okay. I haven't rereviewed your
16 findings of fact. At the last meeting I made clear to
17 you that I wanted the proposed findings and rulings
18 presented to me in a different way so I'll have to
19 review those during the course of the trial to see
20 whether you've complied or not.

21 If you are ready to proceed, we can have
22 opening statements, and then we'll go from there.

23 MR. BIAGETTI: Your Honor, I have a couple
24 housekeeping things, and I bet Mr. Flynn does, too.

25 First of all, good morning. There are a

1 couple of summary graphics that each side had
2 exchanged and intended to use in the opening. Not
3 many. A couple. We have objections to the two that
4 the government intended to use, and one in
5 particular I --

6 THE COURT: When you use them, I'll hear your
7 argument. I can't imagine that I would sustain an
8 objection at a bench trial for something like that.
9 If it doesn't persuade me, I won't consider it. If it
10 does persuade me, I'll use it. That's the way it
11 goes, you know.

12 MR. BIAGETTI: Fair enough. I'm burdening
13 your Honor because one, in particular, relies almost
14 completely on that Ropes & Gray memo that we talked
15 about in chambers last week. It is a lawyer's recap
16 of in some cases --

17 THE COURT: I'll figure it out when I see it,
18 okay? I mean I don't want to see it twice to figure
19 it out. When it's offered, object, and I'll figure it
20 out.

21 MR. BIAGETTI: Fair enough. One other. I
22 know that I will refer to a couple of passages from
23 Mr. Abbe's designated testimony, which I believe are
24 at the heart of the case -- what GE knew at the time
25 of Fletcher's use -- and I know that those have been

1 objected to by the government. I've let them know
2 that. I don't think they have a problem with me
3 referring to them, but there again, if you want to
4 take five minutes to take that up right now, I'm happy
5 to do so.

6 THE COURT: No. I'm not a jury, okay? You
7 don't need to try to -- and you can't. The idea that
8 you rule on these things in advance is so that you
9 shield the jury from having to consider things that
10 are not ultimately admissible, but since I am both the
11 finder of fact and the ruler on whether things are
12 admissible or not, I have to see the things that you
13 say are not admissible to decide whether they're not
14 admissible so I have to be exposed to them in any
15 event. So why be exposed to them twice? Why not wait
16 until they're offered, object and we'll go from there?
17 If I determine that I shouldn't rely on them, I won't
18 rely on them. If I determine they're not persuasive,
19 I won't rely on them.

20 Bench trials don't work like trials -- jury
21 trials for that reason. I think it's much more
22 efficient.

23 MR. FLYNN: Can I just clarify one item, your
24 Honor? In the opening we are using demonstrative
25 exhibits for illustrative purposes. We're not even

1 seeking to move them into evidence, and the areas that
2 Mr. Biagetti objects to, as far as the support, there
3 are three stipulated facts that the parties filed this
4 morning that support it.

5 THE COURT: We'll get into it when we need
6 to. Keep the focus on the real issues, and we'll try
7 to get through this faster. Are you ready to go?

8 MR. FLYNN: Yes, your Honor.

9 THE COURT: All right. Let's go.

10 MR. FLYNN: Good morning, your Honor. I'm
11 Peter Flynn with the Department of Justice, and
12 there's Catherine Fisk, Laura Rowley and Donald
13 Frankel, who are also representing the United States
14 in this matter.

15 What is this case about? This case is about
16 GE's disposal of its scrap -- its waste. GE's scraps
17 consisted of CERCLA hazardous substances.
18 Specifically, polychlorinated biphenyls, PCBs and
19 other substances, such as TCE, trichloroethylene.
20 That is material that is a waste under the Resource
21 Conservation Recovery Act.

22 The United States seeks a determination that
23 GE is liable under CERCLA for the environmental
24 contamination at the Fletcher Paint site in Milford.

25 The only issue, as your Honor said, for this

1 phase of the proceeding is did GE arrange for the
2 disposal of this scrap material. All other aspects of
3 GE's CERCLA liability have either been stipulated to
4 or scheduled for the next phase of this proceeding.

5 Your Honor has received extensive summary
6 judgment findings, arguments, pretrial filings, and
7 tomorrow your Honor will be receiving supplemental
8 legal briefs so I'm not planning on covering the whole
9 gamut of the legal and factual issues in this case.

10 The evidence in this case is varied and in
11 many cases quite old. There are documents that are 40
12 to 50 years old, depositions which are 16 years old,
13 witnesses who are testifying or in person that are in
14 their 70s and their 80s.

15 You will hear testimony from three former
16 Fletcher employees, Wallace Hooper, John Racicot and
17 Richard Whitney. You will also view a videotaped
18 deposition of a former GE employee, Robert Abbe, and
19 there are designated deposition transcripts for some
20 Fletcher employees and GE employees.

21 The parties have worked very hard to
22 stipulate to as many facts as we have, finishing up at
23 midnight last night and filing them at 7:00 this
24 morning. We have about 128 stipulated facts which
25 hopefully will streamline this proceeding.

1 What I would like to just go through now is
2 the simple chronology of events. 1953. A GE ledger
3 will show that in 1953 a Fletcher company received
4 scrap Pyranol, scrap PCBs from GE and a ledger that
5 says N/C, no charge.

6 Your Honor will hear via deposition testimony
7 from a son of Frederick Fletcher, Richard Fletcher,
8 establishing that his father's operation included that
9 of a junk man. He was a collector.

10 We anticipate that Mr. Hooper will testify
11 that Fletcher was looking for a buyer for GE scrap
12 Pyranol because he had no idea what he would do with
13 the scrap and just hoped to make a dime on it.

14 Let's focus on what this case is all about.
15 GE's scrap. The scrap PCB material. I would like to
16 show your Honor U.S. Demonstrative Exhibit 71 somehow.
17 I think we're -- our computer is A, government table.

18 THE COURT: So we haven't enabled you yet,
19 huh? All right. Do you know what number your table
20 is?

21 MR. FLYNN: It's table --

22 THE COURT: Is it PC-3A or PC-3B?

23 MR. FLYNN: It's 3A, your Honor.

24 THE COURT: Okay.

25 MR. FLYNN: Okay. That's it. This is the

1 U.S. Demonstrative Exhibit 71. What does this exhibit
2 show? This exhibit shows various materials that would
3 be present in the scrap Pyranol drums from GE's
4 manufacturing operation.

5 The material came in from drip pans, troughs,
6 catch basins, spills, draining. The material included
7 TCE, different dielectric fluids, degreasers, mineral
8 oil, castor oil, water, dirt, insulation, soil, paper
9 and even cigarette butts, and your Honor, to
10 supplement this table and just to put it on the
11 record, I just want to point your Honor's attention to
12 the stipulated facts that were filed this morning,
13 number 48, 59 and 68, which provide support for a
14 number of these items on this table.

15 Now, your Honor, the United States is not
16 claiming every single drum contained this collection
17 of contaminated material. Some drums probably were
18 nearly pure Pyranol. However, even for those drums
19 that were nearly pure Pyranol --

20 THE COURT: Let's go through it step by step
21 from the time the chemical that becomes Pyranol is --
22 enters the GE facility until it leaves. What's the
23 chemical that you use to make Pyranol?

24 MR. FLYNN: Well, your Honor, let's turn then
25 to Plaintiff's Demonstrative Exhibit 69, which I think

1 addresses some of those issues.

2 THE COURT: All right.

3 MR. FLYNN: On the screen now, your Honor, is
4 Plaintiff's Demonstrative Exhibit 69.

5 THE COURT: What is Aroclor?

6 MR. FLYNN: Aroclor is a PCB product that was
7 manufactured by Monsanto. That was -- the raw
8 material, as you would, that was sent to GE and
9 processed by GE to create their dielectric fluid,
10 which was called Pyranol.

11 THE COURT: What did GE do to it to make
12 Pyranol?

13 MR. FLYNN: Among other items, I understood
14 they filtered it through something called filler's
15 earth to get rid of some water and chlorides, and for
16 some of the material they added substances. They
17 added trichlorobenzene, I think it is, in small
18 amounts and beta chloroethylene. They basically
19 added for some of their products -- it was not pure
20 PCBs but was a mixture. It could be 75 percent PCBs
21 and 25 percent another item. They used that material
22 to fill up their capacitors. That's where the -- and
23 I'm not asking to go back to that at the time but --
24 well, I guess, yes, I will. If we could switch back
25 to Government Exhibit 71?

1 So the material was basically changed from
2 Monsanto by GE creating their Pyranol from the
3 Aroclors, and this shows the steps in the
4 manufacturing process of the capacitors and the
5 different type of waste products that were generated
6 during each of those steps.

7 THE COURT: What did they do with the
8 Pyranol? How was it used?

9 MR. FLYNN: I think their main purpose was as
10 a dielectric fluid for its electrical capacity, and so
11 they were basically using it in their capacitors and
12 transformers.

13 THE COURT: What is a dielectric fluid?

14 MR. FLYNN: Well, I'm sure GE has a deeper
15 understanding of that, but it prevents arching, or
16 basically you can use a capacitor without it blowing
17 up or being damaged.

18 THE COURT: How is Pyranol used in the
19 capacitor?

20 MR. FLYNN: I think it's used however the
21 capacitor is configured. It's -- I'm stretching here,
22 your Honor. I don't really have that exact answer.

23 THE COURT: Do you know? Do the defendants
24 know? How is Pyranol used in a capacitor?

25 MR. BIAGETTI: I believe that it helps with

1 the conductivity and also safety.

2 THE COURT: Well, I'm asking less function
3 and how simply -- is it poured into a part of the -- a
4 part of something and sits there between two
5 connection points?

6 MR. BIAGETTI: The capacitor, as I understand
7 it, is submerged and the Pyranol is injected into it.

8 THE COURT: All right, and --

9 MR. HILL: Your Honor, the capacitor
10 generates a tremendous amount of heat, and the way
11 Pyranol is used in a capacitor is to surround the
12 coils. Depending on the nature of the Pyranol used,
13 it can be a liquid and it can be as thick as almost a
14 waxy-like substance.

15 So what happens when the capacitor -- if it
16 overheats or it archs, there's too many sparks, the
17 Pyranol prevents fires and burns and burning, and so
18 it allows the capacitor to be used safely inside
19 buildings or --

20 THE COURT: So then a significant amount of
21 this Pyranol, if it is used properly, remains in the
22 capacitor during its useful life.

23 MR. HILL: It stays in the capacitor for its
24 entire useful life. It has to be incredibly pure or
25 the capacitor itself won't work. I don't know the

1 exact purity, but I mean the comparison would be like,
2 you know, the chips in computers. It has to be
3 really, really pure or it won't work.

4 THE COURT: So its principal use then is to
5 be put inside the capacitor to serve this function
6 that has been identified?

7 MR. HILL: Correct, and then it's used also
8 in transformers -- which is a different kind of
9 electrical equipment -- in much the same fashion.

10 THE COURT: Did GE use it for transformers,
11 as well as capacitors?

12 MR. HILL: Yes, and those vary in size from
13 things you see hanging on a pole outside someone's --
14 down the street to very large capacitors and
15 transformers for buildings and utility companies.

16 THE COURT: Was it used in essentially the
17 same way in transformers?

18 MR. HILL: Yes. It's just a matter of size.
19 The functionality is essentially the same.

20 THE COURT: All right. So now we're back
21 to -- I think we're at the point where your diagram
22 then becomes relevant. You've taken me through the
23 stuff comes into the factory as Aroclor. It gets
24 processed by filtering and through addition of other
25 chemicals. It becomes Pyranol. It's then employed in

1 the process of manufacturing capacitors and
2 transformers, and it actually becomes a part of the
3 capacitor or transformer in that it is placed inside
4 it and remains in the capacitor/transformer during its
5 useful life.

6 MR. FLYNN: Yes.

7 THE COURT: I think now we're at your stage
8 where you're talking about what happens to it, right?

9 MR. FLYNN: Yes, and I would like to go back
10 to Demonstrative Exhibit 71.

11 In the process of creating this capacitor,
12 different waste products are produced, and this
13 diagram goes through the different aspects where waste
14 products are produced.

15 THE COURT: How are wastes produced during
16 the process of making a capacitor or a transformer --
17 waste Pyranol?

18 MR. FLYNN: It drips into drip pans when it
19 is being impregnated. When it's being sealed, it
20 collects in troughs. When it's being transported on a
21 conveyor belt, it gets caught in a catch basin.

22 THE COURT: It goes -- some of it that is
23 meant to be in the capacitor/transformer instead ends
24 up in a drip pan rather than in the
25 capacitor/transformer.

1 MR. FLYNN: Correct. Along with other
2 material that is caught that is in the drip pans.

3 THE COURT: All right, and then what are the
4 other sources of waste Pyranol during this process?

5 MR. FLYNN: In that particular process
6 there's testimony and there's also some stipulated
7 facts that other debris would be caught in the drip
8 pans. We even have testimony from some GE witnesses
9 about cigarettes butts winding up in the same place as
10 the caught Pyranol in that process.

11 THE COURT: I'm sure some of it spills on the
12 ground and has to be cleaned up; is that correct?

13 MR. FLYNN: Some of it is spilled on the
14 ground, was cleaned up, and we have testimony that
15 that, along with the dirt, was also put into scrap
16 Pyranol.

17 THE COURT: All right. So I've got drip pan
18 and spill. What else?

19 MR. FLYNN: Then, again, troughs in the
20 sealing process.

21 THE COURT: What is that word that you're
22 using?

23 MR. FLYNN: I'm looking at the second arrow
24 from the left here.

25 THE COURT: Trough? What's a trough?

1 MR. FLYNN: That's sort of another collection
2 device underneath the sealing process, and here
3 mineral oil, pump oil, water and other items were
4 collected along with --

5 THE COURT: Can GE give me a little bit more
6 detailed description of what a trough is?

7 MR. HILL: It's a trough. It's a collection
8 basin.

9 THE COURT: Is it underneath a drip pan?

10 MR. HILL: I think it would be the equivalent
11 of a drip pan.

12 THE COURT: Okay. Because a lot of times
13 what they'll -- I don't know anything about this
14 process, but I used to go to a lot of chemical plants
15 and look at things. They have collection pans
16 underneath, and sometimes they would have cuts in the
17 floor that -- things that didn't get in the collection
18 pan would go in the floor and then flow into some
19 other area where that would be collected. Is that
20 what a trough is?

21 MR. COWAN: Your Honor, I don't know that.

22 MR. HILL: It could be, your Honor. It's not
23 quite clear where Mr. Flynn is referring to in the
24 testimony.

25 THE COURT: Do you know what that is?

1 MR. FLYNN: I think Mr. Huchro, who is one of
2 the designated depositions, with no objections from
3 either party, goes into extensive detail about the
4 process and these various collection items, including
5 the troughs.

6 THE COURT: Okay. Troughs. Okay. What
7 else?

8 MR. FLYNN: The third arrow from the left is
9 transporting via conveyor belt, and here we also have
10 catch basins.

11 THE COURT: Transporting of what, the actual
12 capacitor or transformer?

13 MR. FLYNN: Of the capacitor, and here again,
14 the catch basin is collecting the Pyranol, but it also
15 picks up other material like TCE, dirt, dust and
16 degreaser.

17 THE COURT: Okay.

18 MR. FLYNN: Then the furthest arrow to the
19 right where it says degreasing and actually cleaning
20 off that capacitor, and as part of that, again, there
21 could be Pyranol leakage and TCE leakage.

22 THE COURT: Well, degreasers are really
23 common in a lot of manufacturing processes.
24 Ordinarily they're -- you know, back in the 50s, I
25 don't know -- but their own process of collection and

1 recycling of degreasers. Are you saying that the
2 degreaser, whatever they used, was just put in a waste
3 Pyranol --

4 MR. FLYNN: No. I think recycling was part
5 of it, but I think at the end of the day or at the end
6 of a certain period of time some of the material was
7 not reclaimable.

8 THE COURT: Yeah, but I'm trying to envision
9 this, okay? You have a -- sometimes a completed
10 manufactured part is degreased. Sometimes a tool is
11 degreased. There's a significant amount of degreaser
12 used in that process and it is collected, and most
13 companies would, to the extent they couldn't recycle
14 it, would have their own segregated degreaser waste,
15 and I'm trying to figure out whether you're saying GE
16 put all of the degreaser waste into the waste Pyranol
17 tank.

18 MR. FLYNN: Not at all. There were TCE waste
19 tanks, also, but we do have some testimony that some
20 of this material did wind up in scrap Pyranol tanks,
21 but they do have separate TCE waste tanks.

22 THE COURT: Are you guys going to refute
23 that? Do you disagree that there was degreasing
24 Pyranol residue that was in the Pyranol that you were
25 selling to --

1 MR. BIAGETTI: You will have testimony by
2 deposition of the chemical technicians at the time who
3 say that they never recall any oil in the tanks. They
4 never recall any contaminants beyond what Mr. Flynn
5 talked about when he said small amounts of chloride or
6 water. We're talking about 30 parts per million could
7 make this Pyranol unfit for GE's use, and those same
8 folks will say that while there were spills, they were
9 rare.

10 THE COURT: I assume GE is a reasonably
11 efficient company. It wouldn't pay for Aroclor and
12 make Pyranol unless it needed to do that, right -- for
13 its manufacturing process, right? If it could collect
14 the Pyranol at very low cost and simply reuse it, it
15 would do so, right?

16 MR. BIAGETTI: Part of the reason for the use
17 of the fuller's earth to filter was to continue to use
18 for as long as it possibly could. At some point it
19 became unusable for GE's purpose.

20 THE COURT: And I assume, therefore, in order
21 to evaluate what was usable and what was not usable,
22 that there would be a lot of testing of this Pyranol
23 at various stages of the process to determine whether
24 it was still sufficiently pure to be used.

25 MR. BIAGETTI: At each cycle.

1 THE COURT: So do we have records as to
2 exactly the extent of contamination that had to be
3 present before GE would treat it as waste Pyranol?

4 MR. BIAGETTI: My understanding was 30 parts
5 per million of either chlorides or water would make it
6 unsuitable for GE's purpose.

7 THE COURT: Did they test for dirt or other
8 kinds of contaminants?

9 MR. BIAGETTI: Well, I believe that they did,
10 but it was not -- because we're talking about such an
11 infinitesimal amount, they relied on chemical testing
12 more than they did the naked eye.

13 MR. FLYNN: Your Honor, there's some evidence
14 in the record that some of the drums from GE contained
15 22 percent trichloroethylene, and Mr. Huchro, the
16 GE --

17 THE COURT: Some of the waste Pyranol was 22
18 percent TCE?

19 MR. FLYNN: Yes, your Honor, and Mr. Huchro
20 also testified, I believe, that some of the drums
21 contained only 25 to 30 percent PCBs.

22 THE COURT: All right.

23 MR. FLYNN: Again, your Honor, I turn your
24 attention to those three stipulated facts that I
25 mentioned which basically verify that this material

1 contained dirt, water, cleaning fluids, scrap pump
2 oil, drinking soda and different types of dielectric
3 fluids. These are facts that were stipulated to by
4 General Electric.

5 THE COURT: All right.

6 MR. FLYNN: And just going off with what Mr.
7 Biagetti said, we're not claiming that each drum
8 contained all this mixture or that each drum only had
9 25 percent PCBs, but even for these nearly pure drums,
10 here are the facts that we think are relevant. GE had
11 no use for that material. GE obviously couldn't
12 recycle it or reuse it.

13 THE COURT: I'm operating under the
14 understanding that if GE transferred even one barrel
15 of waste Pyranol to Fletcher under circumstances where
16 that transfer qualifies as an arrangement for
17 disposal, that that ends my analysis. That that's all
18 that needs to be established at this phase of the
19 trial.

20 So that there could be a thousand barrels of
21 Pyranol that GE arranges to transfer to Fletcher
22 knowing that Fletcher is going to not dispose of it
23 but use it in another process, but transfers one
24 barrel with 25 percent TCE in it that is intending to
25 be disposed and knows that Fletcher can't use it

1 because of the contaminants in it, and once I make
2 that finding, that's all I need to do at this stage of
3 the proceeding.

4 MR. FLYNN: That's the United State's
5 position, your Honor, and GE is not totally without a
6 defense at that point because the next phase of the
7 trial they could take that information and use it to
8 convince your Honor that there's some apportionment of
9 harm based on whether they had one drum out of, you
10 know, 300,000 or more.

11 THE COURT: That's why I asked at the
12 beginning whether the sole question is whether there
13 was to some degree an arrangement for disposal.
14 That's all I need to decide now. How much of the
15 stuff was transferred as an arrangement for disposal
16 is not something I need to resolve at this stage.

17 MR. FLYNN: That's the United State's
18 position, your Honor. Though on the evidence that we
19 have, you know, will show more than just one drum, and
20 we want to put that evidence before you.

21 THE COURT: Okay. Your diagram talks
22 about -- in addition to the four sources of
23 contaminated Pyranol, you talk about a repair being
24 made. What are you going to tell me about that?

25 MR. FLYNN: Again, there was an area where

1 some of the capacitors were rejected and the Pyranol
2 was drained out of them, and as part of the collection
3 process other material would get into where the --

4 THE COURT: These are not used capacitors and
5 transformers. These are capacitors and transformers
6 that for some reason never left the GE plant?

7 MR. FLYNN: I believe so, and in fact, I
8 think GE, as part of their quality assurance/quality
9 testing program for their capacitor customers, did
10 these arch testings to see what electric capacity they
11 could withstand, and for some of these capacitors when
12 they reached the limit, the Pyranol basically turned
13 black and they established what their scientific
14 cutoff was, but they had to get rid of that material.
15 So that would be one area of the scrap Pyranol -- this
16 black material that hadn't survived the electric
17 currents.

18 THE COURT: Okay.

19 MR. FLYNN: Your point is well-taken, your
20 Honor, about the one drum aspect, but we just wanted
21 to point out that even for the better material, you
22 know, that was material GE wasn't being able to
23 recycle. Monsanto didn't want it back. GE had its
24 own paint manufacturing facility, but there's no
25 indication that GE ever used the scrap Pyranol in its

1 own paint manufacturing.

2 At the GE facility where there would be one
3 drum of this horrible stuff and one drum of nearly
4 pure Pyranol, they weren't labeled as such in the area
5 where they were picked up.

6 THE COURT: Yeah. I make the point because
7 it seems to me that one argument that is at least open
8 to you is that even if Fletcher had some plan to use
9 the least contaminated Pyranol, he was making an
10 arrangement with GE to take the good and the bad,
11 dispose of the bad and use the good, and that that was
12 what the arrangement was with GE.

13 I mean your position, I think, is I can
14 establish that every drum -- it was an arrangement to
15 dispose of every drum, but where someone pays for a
16 bunch of drums over a long period of time with varying
17 degrees of contamination, it certainly is a reasonable
18 economic behavior for someone who can dispose of the
19 bad at low cost, use the good to pay something for a
20 load that contains both good and bad. Do you see what
21 I'm saying?

22 MR. FLYNN: Yes, your Honor.

23 THE COURT: I don't know if that's an
24 argument you're going to present to me, but that's at
25 least something that would occur to me as an argument

1 that someone in your position might be trying to make.

2 MR. FLYNN: Sure, your Honor. I would say
3 there's the range of really good stuff to really poor
4 stuff, and under the --

5 THE COURT: A rational economic actor in
6 Fletcher's position might pay a price to take the
7 whole lot -- pick out from it what he can use and
8 discard the rest, and GE could be a knowing
9 participant in that process and have intended that
10 that occur, and therefore, to the extent to which it
11 was agreeing with Fletcher that the waste -- the bad
12 contaminated waste would just be disposed of, they
13 otherwise arranged for disposal as to those, even if
14 they didn't as to everything. That's at least an
15 argument. I don't know whether it's one you're going
16 to pursue.

17 MR. FLYNN: Yes, your Honor, and we do have
18 testimony from Fred Fletcher's son, Richard Fletcher,
19 that for some of this poor quality material, this thin
20 Pyranol, it was used as a dust suppressant at the
21 facility. They used a lot of it. They just poured it
22 over the ground, and that's part of the contamination
23 that we're dealing with now.

24 I would like to turn now back to Exhibit 69.
25 We went through the first top of this chart, your

1 Honor, about what was the product from Monsanto and
2 what did GE do with it, did it become scrap Pyranol,
3 and here I think it's relevant to focus on what GE did
4 with this waste -- with this waste product.

5 GE has stipulated that they discharged a
6 bunch of it into the Hudson River. They stipulated
7 that they discarded it into landfills. They
8 stipulated that they transferred to municipalities
9 that used it as a dust suppressant. We have other
10 evidence that establishes -- well, actually GE has
11 stipulated that it gave free scrap Pyranol to its own
12 employees, and we have evidence that shows that these
13 employees used it as a weed killer.

14 There is evidence that it was removed by
15 "scavengers", and then, of course, we have evidence
16 that it was provided to Mr. Fletcher.

17 So then I think the next question is, what
18 happened to the scrap Pyranol at Fletcher's, to the
19 extent that that is a major, relevant item. As I just
20 mentioned earlier, we have testimony that --

21 THE COURT: Before we get to that, logically
22 there's going to be testimony about what were the
23 dealings between GE and Fletcher so why don't you tell
24 me what your evidence will be on that.

25 MR. FLYNN: Yes. Well, okay. I can go right

1 into -- I was actually going to give you a chronology
2 of that.

3 THE COURT: Okay.

4 MR. FLYNN: So why don't I skip to that part
5 and focus on that.

6 THE COURT: All right.

7 MR. FLYNN: As I mentioned, 1953 was the
8 first known dealing that we know of between GE and a
9 Fletcher company where scrap Pyranol was provided to
10 Fletcher, and the ledger has the indication N/C, which
11 pretty much everyone understands to mean no charge.
12 So our position is that the very first dealing between
13 these two entities was GE provided free scrap Pyranol
14 to Fletcher.

15 In 1956 a company called Webster Cement, also
16 known as Webtex, started picking up scrap PCBs from
17 Fletcher. Fletcher finally found somebody that might
18 have some use for it. GE has stipulated, however,
19 that GE did not know of the existence of Webster or
20 Fletcher's relationship with Webster.

21 THE COURT: I'm sorry. Was GE dealing with
22 Webster or was Fletcher?

23 MR. FLYNN: Fletcher was dealing with
24 Webster, and GE had no knowledge of the existence of
25 Webster.

1 THE COURT: What do you say Webster was using
2 it for?

3 MR. FLYNN: Well, it's a little bit of a
4 mystery, your Honor. We don't know -- there was a
5 lack of documentation and evidence concerning Webster.
6 I can see that Webster was a roof coating
7 manufacturer. We don't have any direct evidence -- I
8 mean they did a number of different products. We
9 don't have any direct evidence of what they used the
10 scrap Pyranol for so it would be just an inference on
11 what they were using it for.

12 THE COURT: What did they pay for it?

13 MR. FLYNN: We don't even have that evidence,
14 your Honor.

15 THE COURT: How do you know they used it?

16 MR. FLYNN: Well, the way I know they used it
17 is that there was a business relationship with
18 Fletcher for a number of years, and at one point it
19 required Fletcher to blend and filter the scrap
20 Pyranol that was too thin from GE to some consistency
21 that was acceptable to Webster.

22 We just don't have any evidence about, you
23 know, what exactly this business relationship was, as
24 far as money, or what Webster was actually using it
25 for. Frankly, he could have been using it for a dust

1 suppressant, but we have no idea.

2 THE COURT: All you know is that he had a
3 relationship where he was filtering Pyranol before
4 transferring it to Webster?

5 MR. FLYNN: Yes. Fletcher was blending and
6 filtering it.

7 THE COURT: What do you mean by blending?

8 MR. FLYNN: Again, we're using thin and thick
9 Pyranol as terms. The thick Pyranol I guess is under
10 the assumption that that's the better quality, and the
11 thin Pyranol, which would probably be diluted with
12 things like TCE or other oil, you know, was basically
13 the junk Pyranol.

14 Webster, we understood, had some kind of
15 specifications for what they would accept. So
16 Fletcher would be blending this thin Pyranol with this
17 other material to get it up to whatever level --

18 THE COURT: Well, are they mixing Pyranol
19 from drum A with drum B to get a Pyranol of the
20 consistency that's acceptable rather than mixing it
21 with other chemicals? That's what I'm trying to find
22 out.

23 MR. FLYNN: The former, your Honor. They
24 were mixing drum A with drum B to get an acceptable
25 type of Pyranol.

1 THE COURT: We don't know what the acceptable
2 type is. You're just presuming that it's thicker, and
3 you don't know what they were paying for it and you
4 don't know what they were using it for.

5 MR. FLYNN: We don't know what they were
6 paying for it. We really don't know what they were
7 using it for. We do know that -- we have some
8 testimony that they needed to get it up to a specific
9 gravity or density of a certain level, and we do
10 have -- as long as we're on the blending and filtering
11 aspect, they filtered it, too, because some of the
12 material, obviously, from GE had, you know, dirt and
13 other items in it, but GE has also stipulated that
14 during this blending and filtering process at
15 Fletcher's there was spillage of this Pyranol on the
16 ground at Fletcher's. Another example of -- during
17 the time period where this material entered the
18 ground.

19 THE COURT: Is Aroclor a product that
20 contains PCB, or is Aroclor a PCB?

21 MR. FLYNN: Aroclor is a PCB. In fact --

22 THE COURT: What is a PCB?

23 MR. FLYNN: It's a polychlorinated biphenyl
24 that has a certain level of chloride atoms, and
25 depending on the chloride atoms is how thick it is.

1 There's different grades of Pyranol from Monsanto.
2 There's 1242, 1248, 1254, 1260, and there's even like
3 a poly triphenyl that's really thick, but what we
4 have, your Honor, is -- 1242 is the one that was
5 primarily used at GE. So again Aroclor and PCBs are
6 kind of interchangeable.

7 THE COURT: What were the uses at the time of
8 the PCBs other than in capacitors and transformers?

9 MR. FLYNN: Well, we have a GE exhibit that I
10 looked at that showed sales from Monsanto during the
11 relevant time period, and the primary sales are for
12 dielectric fluids in capacitors and transformers.

13 The second most sales are for what's called
14 plasticizers, and plasticizers cover actually a wide
15 range of material. They could be like shoes. It
16 could be used like in heavier -- PCBs could be used in
17 the creation of shoes. Plasticizers create some
18 flexibility. It was certainly an additive to some
19 specific type paints, some rubber -- like chlorinated
20 rubber paints, and there's a range of items that a
21 plasticizer would go into so that was the second most
22 sales by the Monsanto company. Again, we're talking
23 pure PCBs here.

24 THE COURT: So I imagine then GE would say,
25 you need pure PCB for capacitors and transformers.

1 You can take much less pure PCB and have them still
2 function as a plasticizer. Therefore, you should
3 conclude that because Fletcher was purchasing it, he
4 was anticipating and GE was anticipating that it would
5 be sold down market where PCBs don't have to be as
6 pure for their use in plasticizers.

7 MR. FLYNN: Our response to that, your Honor,
8 is that GE had its own paint manufacturing facility
9 just up the road from where this scrap Pyranol was
10 produced. We sent GE discovery responses saying, you
11 know, hey, did you guys use plasticizers, did you guys
12 use scrap Pyranol. The discovery responses that came
13 back included a patent and another document that
14 showed that GE either had a patent or capacity to use
15 a plasticizer in its business. It could use Aroclor
16 that was produced by Monsanto.

17 However, there's no evidence that they drove
18 their truck a few miles up the road, gave them the
19 scrap Pyranol and they used it in their own paint
20 manufacturing facility.

21 Related to that, your Honor, we have a paint
22 formulation expert, a Mr. Granito, who has been in the
23 paint business for 45 years, directly hands on.

24 THE COURT: Why shouldn't I engage in this
25 kind of reasoning? GE is a sophisticated company in a

1 business to make profit. GE is able to identify the
2 marketplace for materials that it can no longer use.
3 If there were a substantial marketplace for the
4 materials that GE could no longer use, it's reasonable
5 to assume that GE would have tried to identify that
6 marketplace. Since the evidence demonstrates that GE
7 discarded -- deliberately disposed of substantial
8 quantities of waste Pyranol, it's reasonable to infer
9 from that that there wasn't a market at the time or GE
10 would have exploited that market.

11 GE doesn't just throw money out the door. It
12 doesn't burn dollar bills. It's in the business of
13 making money, and wouldn't we expect to see GE dealing
14 with the market that exists for plasticizers if it
15 could exploit that market by selling Pyranol in the
16 marketplace?

17 MR. FLYNN: Definitely, your Honor. For
18 example, with things like that you would expect that
19 they would be advertising the scrap Pyranol. We have
20 no indication they ever advertised it to anyone, and
21 you would be expecting that this scrap Pyranol would
22 be handled like other products. Like, for example,
23 their capacitors and transformers had -- you know,
24 contains PCB. Be careful. Use the right safety
25 procedure. None of that was on these scrap drums.

1 They were stored in the scrap and salvage area of GE.

2 THE COURT: Okay. Keep going.

3 MR. FLYNN: And just again -- I don't want to
4 beat this point too much, but our paint expert would
5 basically say, even if the scrap Pyranol was decent
6 quality -- because you didn't know what was in this
7 drum or in this drum -- you would be playing Russian
8 roulette, essentially, with the batch of paint you
9 were making because paint has specific, precise
10 formulas. If you didn't really know what was going in
11 it, you might have saved some money but you could have
12 ruined the whole batch so this was not really a good
13 approach to use for a scrap Pyranol, as compared to a
14 pure PCB product.

15 THE COURT: All right.

16 MR. FLYNN: As I mentioned, at some point
17 Webster returns the PCBs -- Webster, Fletcher's
18 customer, returned PCBs to Fletcher saying, I can't
19 use this. It's too thin. Fletcher's drivers went and
20 complained to the foreman at GE, Mr. Tony Metevier,
21 about the poor quality of PCBs they were getting. So
22 at that time Tony Metevier provided Fletcher with some
23 free shipments of scrap Pyranol to make up for the
24 poor quality they had previously provided.

25 So our position is at that point anyway Tony

1 Metevier, a GE employee, knew that --

2 THE COURT: Do you think that cuts your
3 way -- that evidence?

4 MR. FLYNN: Well, it shows that Mr. Metevier
5 knew that they had been providing basically unusable
6 Pyranol.

7 THE COURT: It also puts GE in a position
8 where GE is acting like an entity that is supplying
9 this not for disposal but for another purpose because
10 why do they say to Fletcher, well, let me make it up
11 to you, if they weren't providing products that they
12 thought Fletcher had some use for apart from disposal?

13 MR. FLYNN: I think the more appropriate
14 inference -- I mean there are a number of inferences,
15 of course, that can be made from these facts -- but GE
16 was a wash in the scrap Pyranol. They were disposing
17 of it in a number of different areas. They had
18 Fletcher's, essentially a scavenger company, taking it
19 from them and even paying them some pennies for it.
20 They wanted to keep this outlet for their scrap
21 Pyranol alive.

22 THE COURT: Is there any evidence that GE has
23 ever had another productive outfit take the scrap
24 Pyranol -- people other than Fletcher who were paying
25 GE for the Pyranol?

1 MR. FLYNN: As far as we were able to
2 discover, absolutely not.

3 THE COURT: So during the entire history of
4 GE's use of Pyranol, the only person that ever paid
5 for it was Fletcher?

6 MR. FLYNN: There might have been some money
7 paid by the towns that used it as dust suppressant. I
8 don't know. A drag strip in upstate New York used it
9 as a dust suppressant. They may have paid for it,
10 too. I don't know that. There is a 1970 document
11 produced by GE that discusses giving it to scavengers.
12 I think that that's probably the category that
13 Fletcher fits in. I would say if we're talking about
14 a market here, your Honor, it's a market of one, Mr.
15 Fletcher, who is really another outlet for waste
16 disposal.

17 THE COURT: The use of a hazardous waste as a
18 dust suppressant is a disposal of the waste; wouldn't
19 you agree?

20 MR. FLYNN: We certainly agree with that,
21 your Honor.

22 THE COURT: When GE has its turn -- I don't
23 understand how -- because in the conference there was
24 some suggestion that if you place a hazardous waste on
25 the ground and you intend to use it for dust

1 suppressant purposes, that's not a disposal, but I
2 don't see how that possibly fits within the definition
3 of disposal, which is quite broad and encompasses
4 placing a waste so that it may be -- the waste or any
5 constituent thereof may enter the environment or be
6 emitted into the air or discharged into any waters.

7 Use of a chemical as a dust suppressant
8 involves placing it on the ground so that it will get
9 into the air and on the ground and in the water,
10 right?

11 MR. FLYNN: That's our position, your Honor,
12 and we believe that that's supported by the case law,
13 including that case that I think GE was involved in
14 with the State of New York.

15 THE COURT: Okay. Well, what else do you
16 want to tell me?

17 MR. FLYNN: There is also testimony -- again,
18 I'm just following a sort of chronological framework
19 here -- that at some point Fletcher's employees had to
20 bring tools with them to the GE facility because the
21 drums that GE was pushing off on them were leaking so
22 they had to tighten them up so that they wouldn't
23 continue spilling during transit.

24 Another what we think is a very important
25 item, your Honor, is that --

1 THE COURT: Are you proceeding under a theory
2 like the one that the Ninth Circuit employed in the
3 Burlington case? Are you saying that they transferred
4 this stuff -- even if they transferred this stuff to
5 Fletcher for use in a manufacturing process that
6 Fletcher had, that leaks inevitably would occur during
7 the transportation process, and to the extent leaks
8 are disposal, GE intended the portion of it that
9 leaked to be disposed of?

10 MR. FLYNN: We're not asking your Honor to go
11 to that extent. In the whole totality of
12 circumstances, we're putting together pieces of
13 evidence -- like that evidence, for example -- again,
14 showing what GE thought about this product --

15 THE COURT: If you're proceeding on that
16 theory, we probably ought to delay the trial until the
17 Supreme Court acts because I don't want to waste my
18 time on that.

19 MR. FLYNN: No. We are not proceeding on
20 that theory. Again, to us, that fact -- one inference
21 is --

22 THE COURT: Don't come back if you lose and
23 tell me -- after the Supreme Court endorses the Ninth
24 Circuit position -- that that's how you were really
25 trying this case, okay? That's not a theory on which

1 you're proceeding. If you were, I would be inclined
2 to say come back and see me in the summer.

3 MR. FLYNN: That's not the theory we're
4 proceeding on, your Honor. Again, that fact -- the
5 inference that we would draw from that fact is that GE
6 is treating this product -- if you call it a
7 product -- it's actually a waste product --
8 differently than it treats the capacitors and the
9 transformers.

10 They have basically these leaking drums with
11 no QA/QC that are sitting in a scrap salvage
12 department. So that fact to us again shows how GE
13 views the scrap Pyranol. It views it as essentially a
14 waste.

15 THE COURT: Okay.

16 MR. FLYNN: I would like to turn -- yes, your
17 Honor. In 1965 -- again, I'll be moving a little
18 quicker, but I just wanted to again give you a
19 chronological framework.

20 GE documents indicate that Fletcher was what
21 was called a cash in advance customer, and what that
22 means was, for whatever credit reason, they required
23 Fletcher to pay before they got the material.

24 However, despite the status that's listed in
25 a GE document from 1965, in the 1966-67 period GE

1 provided Fletcher 100,000 gallons of scrap Pyranol
2 without acquiring payments in advance. 100,000
3 gallons. In August '67 GE writes to Fletcher, a CI
4 customer, again and demands payment. GE does not get
5 paid.

6 However, after that time there were three
7 additional shipments from GE to Fletcher. They
8 continued to offload this material to Fletcher. The
9 last one was received in November '67.

10 In February '68, Fletcher writes to GE to
11 complain about the quality of the scrap Pyranol, and
12 here is, I think, a really significant exhibit, your
13 Honor. I would like to turn to U.S. Exhibit 5. It's
14 a little foggy, but we'll zero in on some parts.

15 This is a letter from Frederick Fletcher to
16 GE complaining about the material received. I would
17 like to turn to paragraph four in this letter on the
18 first page. Mr. Fletcher is basically saying that the
19 material that he's been receiving of late from GE was
20 garbage in the chemical trade.

21 Moving further down on that page to paragraph
22 five, one of the reasons that this change occurred was
23 that Fletcher was no longer sending trucks to GE where
24 Fletcher's drivers at GE could see if the stuff was
25 bad or good. Apparently there were contract truckers

1 used at this time, and they were not doing the checks
2 at GE that would have separated out the awful material
3 from some stuff that wasn't as awful.

4 If you turn to the second page at the top,
5 the first paragraph, at this time -- and this is a
6 1968 letter. Fred Fletcher states that he had 1,800
7 to 2,000 drums on hand of this material. 1,800 to
8 2,000 drums.

9 If you could turn further down on that same
10 page to the fourth paragraph, he's describing the bad
11 drums, and I think what's really interesting is his
12 last sentence in this paragraph. He's basically
13 noting that they've just been loading anything they
14 want onto these contract trucks and sending them off
15 to his place.

16 We will expect that your Honor will hear
17 testimony confirming that these later shipments from
18 GE were very, very poor quality, and the contract
19 truckers were used. We have testimony that will
20 support that.

21 GE knew that Fletcher didn't want this poor
22 material. GE then took this letter, and what did they
23 do? They took some of the material and they sent it
24 back to Monsanto and they said, well, you know, look
25 at this material and you tell us what you think about

1 it, and so there's a correspondence -- there's a
2 letter -- there's a document from GE that basically
3 says Fletcher's complaints are correct. This scrap is
4 badly contaminated, and this document from GE is one
5 of the ones that says some of the drums contained up
6 to 22 percent TCE. So these drums were tested and
7 found to be really junk, and that was what Mr.
8 Fletcher was complaining about. GE wrote off the
9 debt. Fletcher didn't have to pay for that.

10 I would like to just put that in a little
11 economic perspective, your Honor. Again, we're
12 talking 100,000 gallons of scrap Pyranol. GE has
13 stipulated that when they bought the Aroclors, PCBs
14 from Monsanto, they were paying Monsanto \$3.00 to
15 \$3.50 per gallon. If this were pure or nearly pure
16 PCBs from Monsanto, it would have been worth \$300,000
17 to \$350,000.

18 Then we get to the next step. GE billed
19 Fletcher's \$7,000 for this material. Ultimately
20 decided it was so bad GE billed them nothing. They
21 paid nothing for this material that if it was pure
22 would have been worth \$300,000 to \$350,000.

23 We will also hear testimony, your Honor, from
24 some GE employees who would say even after this
25 juncture, even after writing off Fletcher's debt, they

1 still wanted to keep a business relationship going,
2 and of course this was an outlet for their scrap
3 material.

4 I would like to show you what's been marked
5 as U.S. Exhibit No. 9. This, your Honor, is a 1970
6 document -- a GE document addressed to the Pyranol
7 Task Force and it discussed -- again, this is 1970.
8 It discussed the past status of disposal.

9 I would like to turn your attention to
10 paragraph three. This paragraph discusses the past
11 status of disposal that is discharged in the Hudson.
12 That's not a contested fact. GE stipulated to that.

13 Paragraph five. This paragraph discusses
14 disposing of it in landfills. That's not a contested
15 fact. GE stipulated to that.

16 Paragraph four. This is where some of the
17 other material went. It went to scavengers, and look
18 at the description here of -- this is a GE document.

19 THE COURT: How close to finishing are you?

20 MR. FLYNN: Very close. This is how they
21 describe the -- where it didn't go to a landfill or it
22 didn't go to the Hudson, what happened to the rest of
23 the material. It was out of sight, out of mind.

24 I'll move on a little quicker now, your
25 Honor.

1 By 1974 Fletcher still had over 1,000 drums
2 at the site that he was trying to get rid of. In 1975
3 Monsanto found out about this. They suggested they
4 should be incinerated.

5 Fred Fletcher dies in 1983. There were no
6 records of sales of any material from Fletcher's from
7 1968 to '83. Somebody in the mid-80s took away a
8 bunch of drums -- some guy named Kamieniki, and at
9 this time the TSCA -- the Toxic Substance Control Act
10 was in play so commercial use of PCBs were either
11 banned or severely restricted. EPA comes on site in
12 1987 and observes hundreds of drums still on the site.

13 You will hear testimony, your Honor, and I
14 have to say that some of this testimony is objected to
15 by General Electric counsel -- the admissibility is
16 contested -- but you will hear testimony that Tony
17 Metevier, the foreman of the scrap and salvage place,
18 heard that Fletcher's was using this as a defoliant
19 and spread on fire lanes.

20 You will hear from Mr. Abbe, who was an
21 upper-ranking corporate person there. He was
22 wondering how such a small paint manufacturer could
23 use the volumes that they were giving, and he thought
24 that Fletcher might be using it as an insecticide,
25 weed killer or dust suppressant. All commonly known

1 uses for PCBs for that time period.

2 In closing, your Honor -- I know this took
3 longer than --

4 THE COURT: I asked you a lot of questions.

5 MR. FLYNN: Okay. I just wanted to say, your
6 Honor, that we believe that the stipulated facts, the
7 uncontested evidence and documents, the testimony and
8 even at the end of the day when we finish up with the
9 disputed facts, that you will conclude that we have
10 met our burden, the United States, in establishing
11 that Fletcher's was just another outlet for GE to
12 dispose of this scrap product.

13 THE COURT: Are you still pushing the theory
14 that you can have an arrangement for disposal if you
15 agree to transfer materials thinking that they're
16 going to be reused but under circumstances where a
17 reasonable person would have understood that they
18 would be disposed of?

19 MR. FLYNN: Yes, your Honor. I just have to
20 check with my co-legal counsel.

21 THE COURT: Whoever best knows that theory --
22 I can't find any support for it in the case law. Do
23 you want to just tell me where it comes from?

24 MR. FLYNN: Well, your Honor -- just a
25 second.

1 (Attorney Flynn confers with Attorney Fiske)

2 MR. FLYNN: Your Honor, one of the attorneys
3 in our group -- per what you've requested and per what
4 we've agreed -- is working on a supplemental legal
5 brief that we'll be submitting tomorrow morning.

6 THE COURT: I'll take a look at it. It seems
7 to me, when I'm just acting as a fact finder, it's
8 good to know what the legal standard is that you need
9 to employ when you find facts, and I tried to read
10 every case that says anything significant about
11 arranger liability, and I don't see any holding of any
12 case where the standard has been construed as broadly
13 as the one that you're suggesting, and indeed, it
14 seems to me that there are cases that hold that the
15 purpose of the -- certainly there are cases that
16 recognize that the sole purpose of the arrangement
17 need not be for disposal. There are cases that
18 recognize that the purpose of the arrangement need not
19 be for disposal. There are cases -- and even those I
20 think that require intent -- for example, the Sixth
21 Circuit has said that while intent is implied in an
22 arrangement for disposal, they rely on the basic
23 concept in American law that one is deemed to intend
24 that which is substantially certain to follow from
25 one's actions.

1 So I see cases that recognize that you can
2 have an arrangement for disposal without an actual
3 intent to dispose as long as the arrangement is such
4 that under the circumstances disposal is substantially
5 certain to result and you're aware of that at the time
6 of the arrangement.

7 But that's as far as I can see the law going
8 in any of the cases that I've looked at. So if you're
9 going to rest your case on this theory that should
10 have known, you're going to have to provide a lot
11 better support for it than you provided today because
12 I just don't see any real support in the case law for
13 such an expansive interpretation of the language of
14 107(a)(3).

15 MR. FLYNN: We're really going, again, you
16 know, with a huge amount of evidence to satisfy the
17 totality of circumstances test. It's not just what
18 the people say.

19 THE COURT: I like totality of circumstances.
20 That's one of my favorite buzz words because the way
21 judges go about deciding cases, almost everything
22 should be decided based on the totality of
23 circumstances, but that begs the question, what has to
24 be proved by the totality of circumstances, and to
25 simply say an arrangement for disposal has to be

1 proved by the totality of circumstances doesn't answer
2 the question: What is an arrangement for disposal?

3 So telling me the test is totality of
4 circumstances -- because I agree that some courts
5 do -- does not provide any guidance as to what
6 arrangement for disposal means, and if those courts
7 are saying one cannot more precisely identify what an
8 arrangement for disposal is, you know it when you see
9 it, look at all of the factors and decide, and it's
10 completely determined without any further guidance on
11 a case by case basis, those courts should say that.

12 I think it's possible to get a better idea as
13 to what the concept of otherwise arranged for disposal
14 means, but I don't think simply using the buzz phrase
15 totality of circumstances answers it. Totality of
16 circumstances as to what?

17 MR. FLYNN: I guess our position with the
18 case law is the cases have identified a number of
19 factors. None of them seem to be preeminent so --

20 THE COURT: Yeah, but factors as to what?
21 See, this is the -- totality of circumstances is a
22 test that describes evidentiary sufficiency. It isn't
23 a test that identifies the legal standard. You still
24 have to prove what by a totality of circumstances?
25 You would say, oh, Judge, otherwise arranged for

1 disposal. I would say, yes, but then I would say,
2 what does otherwise arranged for disposal mean? The
3 answer to that is not to say totality of
4 circumstances. Do you see the problem? That's the
5 problem with that test. It doesn't -- you have to
6 answer the question: What has to be established by
7 totality of circumstances?

8 MR. FLYNN: I guess -- you know, again, the
9 cases, as your Honor pointed out at the summary
10 judgment hearing, are pretty all over the place.

11 THE COURT: They're complete muddle.
12 Completely almost incoherent in how they address this
13 problem, but the ones that are particularly incoherent
14 are the ones that say the test is totality of
15 circumstances but then don't go on to try to give any
16 guidance, and to say totality of circumstances, intent
17 is one factor to be considered, doesn't really tell
18 you anything more about what otherwise arranged for
19 disposal is.

20 Now, there are some concepts that can't be
21 more precisely defined. You know, maybe obscenity is
22 like that, if you believe that famous "I know it when
23 I see it" comment, but I think otherwise arranged for
24 disposal can be more precisely explained in a way that
25 is useful to judges, and you would use standard

1 approaches to try to give meaning to that language,
2 right? You would use -- start from the text and ask
3 yourself, what does otherwise arranged for disposal
4 ordinarily mean? Is there something about its use in
5 this particular context that suggests different
6 meanings? Is there something, in light of the overall
7 purpose that CERCLA is attempting to achieve, that
8 supports a broader or a narrower interpretation if
9 more than one interpretation is possible from the
10 text? Telling me totality of circumstances doesn't
11 help me answer that question at all.

12 If I wanted to evade responsibility for
13 trying to give meaning to the statute, I might do
14 that. That makes it hard to reverse me because you
15 don't really know what I've done, but I think I owe it
16 to the parties and to the reviewing court to try to
17 explain as best I can what I understand that concept
18 to mean when I make my ultimate ruling on it.

19 And I don't think it means reasonably should
20 have known. It might mean intended in the broadest
21 sense of -- actually desired that the outcome occur or
22 was aware that the outcome was substantially certain
23 to follow from the act. That concept is not knew or
24 should have known. That's a -- in the law it's called
25 a constructive intent sometimes. You see it in the

1 criminal law. You see it in the Restatement (Second)
2 of Tort. If you look up intent in the Second
3 Restatement, what does it tell you? It tells you -- I
4 think I've actually got it here. Intent is used
5 throughout the restatement to denote that the actor
6 desires to cause the consequences of his act or that
7 he believes the consequences are substantially certain
8 to result from it.

9 That's not reasonably should have known.
10 That's a much more rigorous standard than reasonably
11 should have known, but it's a standard that's
12 well-grounded in the law of intent, both in criminal
13 law and tort law, and if that's what you're thinking,
14 that concept has at least been recognized by the Sixth
15 Circuit, which is one of the cases I think GE thinks
16 is an intent jurisdiction.

17 If you look at the Sixth Circuit's opinion in
18 the Carter -- in the Carter Jones Lumber Company case,
19 the court there says -- after talking about intent
20 being the standard -- normally the actor is presumed
21 to have intended the natural consequences of his deed,
22 citing that well-established legal principle.

23 So I think you would be better off -- and
24 I've been trying to essentially help you define your
25 positions because when you started summary judgment

1 you were, in my view, off in Neverland.

2 MR. FLYNN: We came back, though.

3 THE COURT: I know. That's good, but you
4 need to come back even further because it seems to me
5 your reasonably should have known interpretation is
6 also untenable. At least what is possible is an
7 interpretation that an arrangement for disposal is an
8 arrangement in which disposal is either intended to
9 follow from the act or substantially certain to result
10 from the arrangement.

11 You can ground that in basic common law in
12 the criminal area and the tort area and cite that
13 well-established legal principle that a person is
14 deemed to intend that which follows naturally from
15 their actions. You can be found guilty and sentenced
16 to prison under that kind of concept of intent. You
17 can be adjudged liable in tort for intentional conduct
18 under that conduct of intent, and I think the argument
19 you would make is it is reasonable to construe
20 arrangement for disposal against that legal backdrop
21 and understand an arrangement for to encompass both
22 desiring a particular outcome and engaging in the
23 arrangement with knowledge that disposal is
24 substantially certain to result.

25 MR. FLYNN: Your Honor, I believe under that

1 standard that you articulated --

2 THE COURT: You believe it under all
3 standards. You may, but it's important to at least
4 try to identify the standard. I don't think totality
5 of circumstances really answers it, and I don't think
6 reasonably should have known is legally tenable as a
7 standard.

8 MR. FLYNN: I guess in my view, for what it's
9 worth, the totality of circumstances kind of leads you
10 into that --

11 THE COURT: Think about what I said to you
12 because if you try to analyze it, I think you'll come
13 to realize that totality of circumstances is a phrase
14 that really is useful in identifying what kinds of
15 evidence can establish a proposition. It doesn't
16 define the proposition. The proposition still has to
17 be stated, and it may be that you can't state the
18 proposition any more specifically than otherwise
19 arranged for disposal, but I think you probably can,
20 as I've just suggested one way to do it, the way GE
21 would do it, and also there's some support in the case
22 law for this, is that an arrangement for disposal is
23 an arrangement, the purpose of which is to dispose,
24 and if there is not a purpose to dispose, there isn't
25 an arrangement for disposal.

1 I think those are two tenable ways to state
2 the proposition, and then after you identify the
3 proposition, then you of course use -- and GE would
4 agree with this -- totality of circumstances to
5 establish whether the proposition is proved.

6 Do you guys see what I'm saying here in terms
7 of the way to go about it? I think the dispute
8 between you as to the legal standard, if you really
9 think about it, probably should be that GE argues that
10 an arrangement for disposal requires an arrangement
11 that the purpose of which is to dispose.

12 Your position, it seems to me, ought to be,
13 it is an arrangement, either the purpose of which is
14 to dispose or for which disposal is substantially
15 certain to result -- from which disposal is
16 substantially certain to result. Both of you then can
17 join in arguing that the totality of circumstances
18 should be considered in determining whether that
19 proposition is established. That's how I would
20 identify the two competing approaches.

21 Have I got GE's position right?

22 MR. BIAGETTI: You have GE's position right
23 to the extent, your Honor, that arrangement for
24 disposal requires intentional action for that purpose.
25 Intentional action may include -- must include

1 knowledge at the time. Knowledge may be proven
2 directly, somebody confesses it, or circumstantially,
3 and I think that's where your substantially certain
4 formulation, I believe, comes in.

5 THE COURT: Well, okay. Now, we're getting
6 somewhere because you may be endorsing a somewhat
7 broader test and maybe a more acceptable test than I
8 thought you were.

9 If you're saying all that's required is an
10 awareness that disposal will result at the time of the
11 agreement --

12 MR. BIAGETTI: No.

13 THE COURT: Okay. You're not saying that?

14 MR. BIAGETTI: No.

15 THE COURT: Then when you're talking about
16 knowledge, that's what you're talking about. Here's
17 the problem. I'll just put to you a hypothetical that
18 will illustrate why your definition is at least
19 problematic to me.

20 If GE has waste on its site and it goes to
21 someone and says, I will pay you to take it away. I
22 don't care whether you resell it. I don't care
23 whether you dispose of it. I am indifferent to what
24 you do with it. It is not my purpose that this be
25 disposed. It is not my purpose that it be reused. I

1 am indifferent to whether it is disposed of or reused.

2 I just want it off my site.

3 If that is what the mind-set of the arranger
4 is under your interpretation in that hypothetical, I
5 assume that GE has not arranged for disposal. Even if
6 it knows that the person is, in fact, going to dispose
7 of it, right? They have actual knowledge.

8 The guy who they send it to says, listen, GE,
9 do you understand, I'm burying this in the ground, and
10 GE says, I don't care. You can sell it if you want.
11 You can do whatever you want with it. I just want it
12 gone. How is that an arrangement for disposal under
13 your hypothetical -- under your test?

14 MR. BIAGETTI: Well, first of all --

15 THE COURT: Is it an arrangement or is it
16 not? I assume it's not under your test.

17 MR. BIAGETTI: No. Then I'm not articulating
18 it properly because you can have it -- if you use your
19 standard of substantially certain, those facts could
20 prove that the arranger, the GE person, was
21 substantially certain that disposal would result.

22 THE COURT: Okay, but understand, here's the
23 problem, okay? I think it's possible to construe this
24 statute -- if you look at the definitions of the term
25 "arrange", the definition of the term "for", and the

1 statutory definition of the term "disposal", I think
2 you could make an argument that the way those things
3 are to be construed together in context requires --
4 and I will take the OED definition of "arrange" --
5 that seems most appropriate to me -- to come to an
6 agreement or an understanding as to mutual relations,
7 claims, matters of dispute -- to come to agreement is
8 essentially what I think is the most likely definition
9 of "arrange".

10 The most likely definition of "for", in
11 context, is a purpose or destination with a view to,
12 with the object or purpose of, okay; and "disposal" is
13 the broad statutory definition of disposal that's in
14 the statute that we've already talked about.

15 So one way to construe this is to say the
16 arrangement must be for the purpose of disposal.

17 MR. BIAGETTI: Yes.

18 THE COURT: The hypothetical I have given you
19 does not involve arrangement, the purpose of which is
20 to dispose. It's an arrangement, the purpose of which
21 is to get it off my property. I don't care what
22 happens to it. It's not my purpose to dispose. I
23 don't care. You act entirely consistent with my
24 purpose if you reuse it, all right, but even if they
25 know it's going to be disposed of, it still isn't GE's

1 purpose to dispose of it under that narrow
2 construction; yet I think you're not arguing for that
3 narrow construction because you realize it would
4 completely defeat the purpose of CERCLA, right?

5 MR. BIAGETTI: Yes.

6 THE COURT: There's the problem. If you
7 interpret the language of the provision as narrowly as
8 the OED definition would suggest, it would leave a
9 gaping hole in arranger liability in which the person
10 responsible for the waste, having full knowledge that
11 the waste is about to be disposed of, could avoid
12 liability simply by claiming indifference as to what
13 happens, and that can't be what it means, right?

14 MR. BIAGETTI: I agree.

15 THE COURT: Indifference is not sufficient to
16 defeat arranger liability. Do you agree with that?

17 MR. BIAGETTI: I do, and that's the Summit
18 case that the government cites to you, and we're going
19 to give you that short memo tomorrow on it because
20 there the arranger was selling the product at auction
21 and essentially said, I don't care who it goes to or
22 what they do with it, and there were lots of other
23 circumstances.

24 THE COURT: So it has to be broad enough to
25 encompass the case in which the transferor is

1 indifferent but understands -- is fully aware that
2 disposal will result, right?

3 MR. BIAGETTI: And again, your formulation,
4 substantially certain that disposal will result. Now,
5 the Burlington Northern panel, with eight judges
6 dissenting on, I think is quarreling with what's going
7 a little further than substantially certain. They
8 were saying something more like actuarially certain,
9 inevitable, there were going to be leaks.

10 THE COURT: The Burlington Northern case
11 points to a problem, and Judge Posner recognized this
12 problem in his case, as well. The purpose and intent
13 is to transfer or reuse a virgin chemical. Is that an
14 arrangement for disposal if the evidence demonstrates
15 that spills inevitably accompany large volume
16 transfers of virgin chemicals for reuse? That's a
17 problem because that's not -- despite the language --
18 what would have been envisioned by CERCLA.

19 Fortunately, that they disclaimed any intent
20 to follow that line of analysis, I don't have to get
21 into that huge -- what I think is a huge Burlington
22 Northern problem.

23 MR. BIAGETTI: They, meaning the government,
24 this morning?

25 THE COURT: Yes. The government.

1 MR. BIAGETTI: I heard that, as well.

2 THE COURT: The government has disclaimed any
3 intention to rely on that theory, it is very
4 problematic, and I don't know how I would resolve it,
5 but I don't have to, and maybe the Supreme Court will,
6 but I agree that the Ninth Circuit -- in a way that
7 Judge Posner would have said is not acceptable to
8 him -- allows for arranger liability under
9 circumstances where the purpose of the arrangement is
10 to transfer a chemical for use but spillage inevitably
11 results, and that, I think, is problematic, but I
12 don't think I have to answer that, and I guess what I
13 need to understand is, to the extent I can convince
14 the government that it should narrow its theory of
15 liability to a circumstance where either there is a
16 desire to achieve disposal or an arrangement where the
17 circumstances are such that the transferor knows that
18 disposal is substantially certain to result, have I
19 narrowed the gap between the two of you so there is no
20 more gap?

21 MR. BIAGETTI: You have certainly narrowed
22 the gap.

23 THE COURT: What I want to know is, is there
24 a remaining gap, and if so, how does your
25 interpretation differ from --

1 MR. BIAGETTI: Only to this extent. GE's
2 position is that arranged for requires intent and
3 purposeful action toward disposal. Intent may be
4 proved directly, a GE witness could confess it, or
5 circumstantially.

6 THE COURT: All right. Here's the problem
7 with -- okay. You're saying substantially certain to
8 result -- disposal is substantially certain to result
9 operates as a kind of evidentiary presumption of
10 purpose, and that still doesn't defeat the -- doesn't
11 resolve the hypothetical.

12 You have the Pope and religious leaders from
13 all over the country in the room witnessing the
14 negotiation between the parties, and it is absolutely
15 undisputed that GE did not have an actual purpose to
16 dispose. It is absolutely undisputed that GE was
17 indifferent to what happened, but it is also
18 absolutely undisputed that GE knew that disposal would
19 occur as a result of the agreement.

20 In that circumstance the government would say
21 there is liability. If the substantially certain to
22 result operates only as an evidentiary presumption, it
23 is overcome by the abundant evidence of actual mental
24 state, and I guess you're saying that -- you're
25 arguing for the interpretation in which substantially

1 certain to result operates as a kind of evidentiary
2 presumption of purpose that can be overcome by
3 sufficient evidence to the contrary; where I think the
4 position I'm advocating that the government should be
5 taking, the narrow position, is that at that point
6 proving that stands in as a substitute for purpose,
7 and even if GE was indifferent, it is sufficient to
8 make it liable, and that interpretation is necessary
9 to solve the problem that would be the gaping hole and
10 liability created by somebody who willfully makes
11 themselves indifferent.

12 You can think about this. We've got to take
13 a break, but I would like to -- it sounds like your
14 positions are getting very close, if I can get the
15 government to modify its view somewhat, but I'm still
16 not sure where there's this little gap, and the way I
17 would define the gap, potentially, is you say
18 substantially certain to result operates as an
19 evidentiary presumption that could be overcome by
20 evidence to the contrary as to what actual intent was;
21 whereas I would expect the government to say, no, if
22 you establish disposal is substantially certain to
23 result, that stands in as sufficient to make the
24 agreement an agreement for disposal, regardless of
25 what the actual intent of the person was because

1 otherwise that provision of arranger liability would
2 be rendered virtually meaningless as all polluters
3 would simply say, I don't care what you do with it.
4 Put it up for auction. Do something like that, and
5 they truly are indifferent because, in fact, most
6 manufacturers who have waste, they don't want to
7 dispose of it. They want it gone. It's not like
8 they're desiring disposal. Let's see if we can
9 contaminate the water with this.

10 I don't think anybody said that's what GE was
11 trying to do when it dumped PCBs into the water. It
12 was trying to get rid of it, and yet it's liable, even
13 though its purpose was not to dispose. Its purpose
14 was to get rid of under circumstances where disposal
15 would inevitably result.

16 So you guys think about this, but I think
17 we're -- you know, first, the government, you think
18 about my analysis because the case law has been very
19 muddled on this, and I thought about it now for a long
20 time, and I think the way I'm thinking about it is the
21 right way to resolve this, and you might get the
22 Supreme Court to adopt a very narrow interpretation
23 because there are some justices on that Court that
24 abdicate a very rigorous form of textualism, and if
25 you did, then arranger liability becomes avoidable by

1 almost all polluters, or you could adopt a somewhat
2 broader interpretation which requires suggesting that
3 in context there's ambiguity in that language because
4 it has to be interpreted in light of the CERCLA
5 statute, as a whole, and against the backdrop of the
6 American common law which recognizes this concept of
7 intent, and the interpretation I'm proposing, because
8 it doesn't leave the gaping hole in liability that
9 would totally defeat the purpose of CERCLA to hold the
10 polluter responsible, is the right interpretation, and
11 I think that's how -- if this issue ever does get
12 squarely addressed by the Supreme Court -- I don't
13 know that it will in Burlington -- that's how that
14 court is going to look at it. It's going to analyze
15 it the way I just have, and they're not going to be
16 considering reasonably should have known because
17 that's too far out there, and they're not going to be
18 talking about totality of circumstances as the
19 defining standard. They're going to talk about
20 totality of circumstances as being the means by which
21 you prove whatever the standard is, and they're going
22 to get into a debate about what arranging for disposal
23 means.

24 Some of the judges who are most narrowly
25 textualist would say it requires a purpose to dispose.

1 If that doesn't work well for CERCLA, too bad.

2 Other justices would say, we have to
3 interpret this against the backdrop of the American
4 common law, the statute, as a whole, considering the
5 purposes of CERCLA, and the reasonable construction is
6 one that allows for liability when there is
7 indifference on the part of the transferor but an
8 awareness that disposal will result.

9 That's how I analyze the whole problem. You
10 guys think about it. Maybe you can come to some kind
11 of agreement with me or at least agree that we're
12 pretty close, and bear in mind, I may not have to
13 resolve that problem to decide the case because the
14 government's view is we can prove there was an actual
15 purpose to dispose when they transferred to Fletcher,
16 and that's what you're going to try to do.

17 MR. BIAGETTI: And our view is that they
18 can't even make it to the substantially certain stage.

19 THE COURT: All right. We'll take a break.

20 (RECESS)

21 THE CLERK: In the matter of the United
22 States of America versus General Electric Company,
23 civil case number 06-CV-354-PB, the government has
24 premarked Exhibits 1 through 74.

25 All exhibits not marked for identification

1 are herewith accepted into evidence, there being no
2 objection by opposing counsel.

3 Those to which objection has been made shall
4 remain marked for ID at this time. They are 9, 10,
5 13, 18 through 21, 31, 34 through 36, 44 through 46,
6 48 through 53, 56 through 58, 60, 61, 63 through 65,
7 68 through 74.

8 Defendant's have premarked Exhibits 1 through
9 83. All exhibits not marked for identification are
10 herewith accepted into evidence, there being no
11 objection by opposing counsel.

12 Those to which objection has been made shall
13 remain marked for ID at this time. They are 1, 3, 5
14 through 7.

15 MR. BIAGETTI: I come with good news, your
16 Honor. In addition to stipulating on a few witnesses
17 and a bunch of facts, GE is prepared to embrace your
18 awareness that the outcome was substantially certain
19 to result in disposal standard. It is an evidentiary
20 avenue to the proof of requisite knowledge and intent
21 to satisfy the statute.

22 THE COURT: Is it a permissive presumption or
23 a conclusive presumption?

24 MR. BIAGETTI: Well, there I don't completely
25 follow you. In other words, you're saying that even

1 if they prove substantially certain, are they presumed
2 to have proven intent?

3 THE COURT: Well, you know how presumptions
4 work in the law. Presumptions can be conclusive or
5 permissive, and the way a permissive presumption would
6 work, you prove the facts that warrant the application
7 of the presumption, and then it simply becomes
8 something that can be a sufficient basis on which to
9 decide the point but is not necessarily a sufficient
10 basis on which to decide the point. Instead you have
11 to look at countervailing evidence.

12 That's why that hypothetical I gave you of
13 the Pope and everyone else sitting in the room
14 watching the actual arrangement be drafted -- there's
15 absolute clarity as to what's intended. Your auction
16 case is probably a good example of that. What was
17 actually in the mind of the person putting it up for
18 auction is, I just want it gone. I'm not wanting it
19 disposed of. I'm indifferent to whether it's disposed
20 of, and if what actually has to be proved is, I want
21 it disposed of, then under that circumstance --
22 evidence that disposal is substantially certain to
23 result is evidence that you might infer that his
24 actual intent is something, but his actual intent is
25 truly -- he's truly indifferent as to whether there's

1 disposal.

2 It's possible to be absolutely indifferent to
3 something that you know will follow from your actions.
4 I want to kill you. I know you're on an airplane. I
5 know there are other people on the airplane. I don't
6 care whether they live or die. I plant a bomb on the
7 airplane to kill you. My purpose is to kill you. I
8 kill 300 other people. It's not my purpose to kill
9 them. It's not my intent to kill them, but in the law
10 I'm deemed to have intended to have killed them, and
11 it's not a matter of, well, what's your actual intent.
12 You know, you knew this would happen so you must have
13 intended. It's that you knew this would happen so
14 you're liable, okay? You're deemed to have intended.
15 You constructively intended it. There are a lot of
16 ways to describe it.

17 If intent encompasses actual intent and
18 constructive intent, then proof of constructive intent
19 is not evidence of actual intent. It's another means
20 by which actual intent -- the intent requirement is
21 satisfied, or you could have evidence of -- you knew
22 that something bad would happen is evidence that the
23 fact finder can take into account in deciding whether
24 you actually intended the bad thing to happen.

25 See, I think this concept is so deeply

1 imbedded in the law that you think of the two
2 circumstances as being identical, and I think most
3 people do, but it doesn't necessarily follow that they
4 are.

5 I think lawyers are almost all trained that
6 the common law -- the way tort law works is that we
7 just understand you're deemed to have intended what
8 will necessarily follow from your actions, but it
9 isn't, as a matter of fact, true, and the case in
10 which you're indifferent to disposal is a case in
11 which you don't intend to dispose. You just don't
12 care, and even if you know that there will be
13 disposal, that doesn't mean that you intended. You
14 still remain indifferent even though you know, but in
15 the law you are -- you have constructive intent to
16 dispose under that circumstance.

17 So I was trying to get at the distinction --
18 it would be possible for you to embrace the should
19 have known standard and say to me, Judge, that's
20 evidence of actual intent but it can be -- the
21 evidence in the case can warrant a conclusion that
22 there was no actual intent, even if we knew that
23 disposal would follow. You have to consider the
24 totality of circumstances, and the challenge is to
25 determine what GE actually intended when it went into

1 the arrangement.

2 You can consider evidence that disposal would
3 inevitably follow from an action, but that doesn't
4 decide the case. You have to still look at everything
5 and ask yourself, considering everything, including
6 evidence that we knew disposal would follow, has the
7 government proved that we intended to dispose. That's
8 one way to interpret it.

9 Another way -- even if the government
10 embraces my standard -- would be to say that's not
11 quite right, Judge. If we proved that GE knew that
12 disposal would follow from the arrangement, we've
13 satisfied our burden of proof and it doesn't matter
14 whether GE had an actual desire to dispose of rather
15 than being indifferent to disposal.

16 So I still think there's a potential
17 distinction between the two of you, and you can think
18 about it some more whether -- in most cases it won't
19 make a practical difference because if the fact finder
20 is satisfied that you knew there was disposal that
21 would result from your actions, it's going to find you
22 intended that. In almost all cases it may be just a
23 theoretical distinction, but it is one that you
24 potentially would have to make.

25 MR. BIAGETTI: In this case, your Honor,

1 respectfully, we believe the evidence will show that
2 the government fails by a preponderance of the
3 evidence to prove that GE was substantially certain
4 that any of the Pyranol it sold to Fletcher would
5 result in disposal. They will not meet that standard
6 in this case.

7 THE COURT: Okay.

8 MR. BIAGETTI: One of the things that's
9 happened since summary judgment, obviously, your
10 Honor, is that --

11 THE COURT: The government might try to go
12 beyond that and say, as it has, well, even if it
13 wasn't substantially certain, it was so likely that it
14 was reckless for them to assume otherwise or it was so
15 likely that it was negligent for them to assume
16 otherwise. They reasonably should have known.

17 I think that gets too far afield from the
18 language of the arranger provision. I don't see in
19 the arranger provision any evidence to suggest that --
20 say someone who sells a virgin chemical to a company
21 for use in that company's product -- that it should
22 have gone out and conducted a site review and realized
23 that they were using some of the product for dust
24 suppressant. Because they didn't do that site review,
25 they're liable as an arranger for disposal because

1 they didn't use reasonable care. That's a whole
2 different approach to liability than seems to be
3 envisioned by the arranger provision.

4 I mean we have to understand the people that
5 draft our laws do not have perfect foresight, and they
6 are not linguists. I think we all know the paradigm
7 problem that the drafters had in mind was the
8 situation in which someone is contracting with a waste
9 company to take the waste away and put it in a
10 landfill. That's the paradigm arranged for disposal
11 case, but I don't think that's the only possible case,
12 but if you're sitting in a room with the people that
13 were drafting this provision and asked them, tell me
14 what you're thinking about while you're drafting this,
15 they would say, you want to capture the case where the
16 guy contracts with waste company A to haul away the
17 waste that's buried in the ground and make them liable
18 in that circumstance, and they probably didn't think
19 beyond that, and then if you ask them, well, what
20 about a case where someone hauls it away but the
21 company doesn't have any knowledge as to what they're
22 going to do with it? You have to -- the problem of
23 getting into intent of the drafter is very difficult.
24 So you look at the language in light of the overall
25 purpose and ask what different ways it can be

1 interpreted.

2 I'm glad to hear your position is not so
3 rigid that you would disavow liability even if the
4 evidence proved that you were substantially certain --
5 that it was substantially certain to your company when
6 you were engaged in the arrangement that disposal
7 would result.

8 MR. BIAGETTI: Yeah, and I was about to get
9 to the evidence, but I want to just make an offer of
10 one other point that may help to make the distinction
11 we're all talking about, and it's the Cello-Foil --
12 the Sixth Circuit case that the plaintiffs talk about.
13 There you had buyers of solvent in drums -- 55 gallon
14 drums. They used the solvent, and they returned the
15 drums and got a deposit back from seller. They knew
16 seller had no use for the solvent. That's why seller
17 was selling to them.

18 Some of those drums had as much as 15 gallons
19 of solvent still in them upon return, okay? The Court
20 held that -- remanded for trial to say there's a
21 question of fact here about what the parties "had in
22 mind". Not what they should have had in mind. Not
23 what was likely. What they had in mind.

24 Leaving residual amounts in the drums may not
25 support an inference of purposeful or intentional

1 disposal. So the standard is still purposeful or
2 intentional disposal based on what the parties had in
3 mind, but one may infer that based on the totality of
4 the circumstances of evidence of what buyers were
5 thinking when they were returning some of those drums
6 with 15 gallons of solvent in them.

7 THE COURT: I understand. The problem
8 though -- the practical problem is in the real world
9 when somebody has waste on their site, they are not
10 going to -- in the ordinary case when they get rid of
11 it by giving it to somebody -- desire that it be
12 treated in a particular way. They don't care. The
13 average person getting rid of waste just doesn't care.
14 They just want it gone, and the only way that that
15 kind of person could be held liable is if they
16 actually intended that it be put in the ground. Then
17 almost no disposers of waste would be held liable
18 because any sophisticated company would simply make
19 sure that it was clear on the record that it was
20 indifferent to whether there was disposal. That the
21 auction example would work, and it doesn't work,
22 right?

23 MR. BIAGETTI: It doesn't work.

24 THE COURT: If the auction example were
25 sufficient, then the arranger liability would have a

1 loophole within it that was big enough to drive a
2 truck through, and every sophisticated company would
3 take advantage of that loophole, and I don't think --
4 it has to be broad enough practically to encompass
5 cases where the arranger understands that there will
6 be disposal but isn't desirous of it. It simply
7 recognizes that there will be disposal as a result of
8 its arrangement.

9 MR. BIAGETTI: So on to, Judge, what the
10 evidence will show here. GE knew and reasonably
11 expected that all of the Pyranol it sold to Fletcher
12 was for his and his company's use. All that GE saw,
13 heard, learned, supported that reasonable
14 understanding.

15 It's not a case like the sellers at auction
16 who have no idea and want no idea. Here GE, from 1953
17 to 1968, sees nothing but something like 77 pick-ups
18 by Fletcher trucks. His son will recall the long
19 rides to GE. 77 pick-ups by Fletcher trucks. He's
20 paying two different prices based on how thin it was.
21 He's not rejecting any of it. He's bargaining. He's
22 paying two different prices, and we find out later
23 that, well, the evidence will establish that it was
24 because he's selling at different prices to his
25 seller.

1 THE COURT: So you're saying that it's the
2 government's contention that the first loads were
3 provided for free?

4 MR. BIAGETTI: It says N/C, and a reasonable
5 inference is that that is no charge, okay? It matters
6 not.

7 Giving a sample by a seller so that buyer
8 will buy and pay and continue to use is completely
9 consistent with an intention to buy.

10 Mr. Flynn, I think, said something like,
11 Fletcher had a hope that he could make a buck from it.
12 If Fletcher was taking it to dispose of for GE, then
13 Fletcher wouldn't have any hope about making a buck.
14 Fletcher would be taking it and throwing it away. He
15 was --

16 THE COURT: You talk about evidence of
17 different pricing for different grades. What's going
18 to be the evidence on that?

19 MR. BIAGETTI: The evidence -- Mr. Hooper,
20 who is about to join us, who was a lifelong worker at
21 Fletcher, will talk about the two different prices
22 that Fletcher paid GE. There's also documentary
23 evidence in that regard. Different prices were paid
24 and --

25 THE COURT: How is it -- were drums marked

1 based on their quality?

2 MR. BIAGETTI: No. In fact, they were not,
3 and so the only way that Fletcher could have known of
4 the difference is that Fletcher did testing.

5 You will hear from Mr. Hooper and Mr.
6 Racicot. These are folks that worked at Fletcher.
7 There were two different ways that it was done during
8 the Metevier years -- we'll call them -- when the
9 fellow in charge at GE would allow Fletcher to take
10 and test back at Fletcher.

11 There was a chemist, a fellow named Bishop.
12 He had a beaker. He had a hydrometer. He would test.
13 Mr. Racicot often helped him. Mr. Racicot will
14 testify to this. He was testing for the quality --
15 the thinness and thickness, if you will -- of the
16 material, and when it did not measure up, he
17 complained to GE and he bargained for a lower price.
18 Even, Mr. Hooper will testify, for the thinner stuff.
19 He never returned it. He never rejected it. He
20 bargained for a lower price.

21 We know why. The evidence will show that his
22 customer, Webtex, wanted the thick stuff, paid a
23 higher price for that, but could still use the thinner
24 stuff. Paid a lower price.

25 THE COURT: What evidence is there of

1 Fletcher rejecting barrels?

2 MR. BIAGETTI: After Metevier retires --
3 which I believe is in '64 or '65, so there's still
4 three years left in the relationship -- a fellow named
5 Varnum comes on, and Fletcher recounts some of this in
6 his letter, and you will also have testimony of the
7 witnesses, and Varnum says to Fletcher, do your
8 testing here. I don't want you taking it, complaining
9 and then we have to bargain over price -- or what the
10 government calls compensatory loads -- because there
11 were some. We allowed him to have some extra when he
12 complained about short loads or inferior loads.

13 THE COURT: Did he bring back inferior loads
14 and give them to GE?

15 MR. BIAGETTI: Never brought a single load
16 back. 77 trips, Judge.

17 THE COURT: Which way does that cut?

18 MR. BIAGETTI: That cuts in our favor.

19 THE COURT: I think the argument would be
20 that the arrangement here was -- one way to construe
21 this is that Fletcher had an arrangement to take the
22 waste off of GE's hands, hoped to be able to use the
23 best of it, recognized it and everybody understood
24 that he was getting a bunch of junk barrels, and those
25 were going to be disposed of.

1 GE's problem was to get rid of its waste. If
2 it could make a little money on the side, great. If
3 there were a few barrels that might be usable, great,
4 but a lot of it was going to be junk and everybody
5 knew it, and that's why he didn't return the bad
6 barrels because if it were a product that was
7 substandard and unusable, the buyer ordinarily brings
8 it back.

9 MR. BIAGETTI: Fletcher's own employee, Mr.
10 Whitney, will testify that every barrel Fletcher
11 bought from GE was either used by Fletcher to make
12 paint in his operation or sold to Webtex. Remember,
13 Judge, it's a long time ago, but Fletcher wanted so
14 much of this stuff because he was making so much money
15 off of it, he was buying from Sprague and Aerovox, as
16 well as GE. When we get to the graphics -- one of my
17 big problems with it is the record evidence is that
18 some of this stuff is not GE's. He was buying from
19 three different sources. What we do know is that --

20 THE COURT: You say he was making so much
21 money. Is there going to be any record as to what
22 money he made from the use of this product or sale of
23 it?

24 MR. BIAGETTI: I don't believe we have any.

25 THE COURT: So we don't know about him making

1 money on it.

2 MR. BIAGETTI: We can infer it, respectfully,
3 from this fact, your Honor. Over those years, '53 to
4 '67, 77 pick-ups, and his consumption increases in the
5 later years. He buys more in '64, '65 and '67 than he
6 did in the prior years.

7 THE COURT: What's he paying per barrel?

8 MR. BIAGETTI: He's paying \$3.50 or \$4.00.

9 THE COURT: What's the cost to transport per
10 barrel, do you think?

11 MR. BIAGETTI: I don't think we have any
12 evidence of the cost. Only that Fletcher was picking
13 up all of the cost.

14 THE COURT: I'm trying to figure the cost to
15 Fletcher for this material. Do you agree that the
16 cost of Aroclor was \$3.00 a gallon?

17 MR. BIAGETTI: That Monsanto sold to GE,
18 yeah. I believe that's right.

19 THE COURT: So the market for uncontaminated
20 PCBs was about \$3.00 a gallon. The market for the
21 product that you say you were selling to Fletcher
22 was -- what are these, 55 gallon drums?

23 MR. BIAGETTI: Yes, they are.

24 THE COURT: And you were paying how much per
25 drum?

1 MR. BIAGETTI: \$3.50 or \$4.00.

2 THE COURT: Quite a bit less.

3 MR. BIAGETTI: A lot less, and the case law
4 makes clear that just because a product is inexpensive
5 doesn't make it waste. If that were enough, then we
6 would have lost on summary judgment.

7 THE COURT: Just because they were inventive
8 isn't enough; and the converse of that, just because
9 he paid for it doesn't make it not enough.

10 MR. BIAGETTI: Understood. Totality of the
11 circumstances. But let's think about all the other
12 things that GE saw that Fletcher was doing.

13 Fletcher was for a time -- the Varnum
14 years -- doing the testing at GE on the loading dock.
15 He was testing. He was selecting those drums he
16 wanted, and he was rejecting and leaving behind
17 others.

18 THE COURT: Can I ask about testing because
19 the government left me with the impression that
20 whatever analysis was being done or whatever quality
21 measure was being used was viscosity.

22 MR. BIAGETTI: For viscosity, correct.

23 THE COURT: So there wasn't an analysis for
24 other contaminants, dirt, cigarette butts or solvents,
25 TCE. Typically, the usefulness of this product

1 depended on its basic content. That it is primarily
2 PCBs and viscosity?

3 MR. BIAGETTI: Yes, and the reason why there
4 was no testing for quality is that Fletcher did not
5 need to test for quality because the evidence will
6 show that everything he was getting was either pure
7 enough -- viscous enough to go directly to Webtex or
8 viscous enough to be blended with other Pyranol that
9 may or may not have come from GE. It could have been
10 from Sprague or Aerovox to sell to Webtex, or that it
11 was thinner but Webtex could still buy it and use it
12 in -- not paint -- roof coating.

13 We have not only the witnesses who will
14 testify to their recollections of that, but the
15 government's own experts agree that even with TCE,
16 oil, dirt, this product was still perfectly acceptable
17 as a low cost substitute in roof coating. It was
18 useful and was used for that purpose.

19 THE COURT: When we talk about use, in your
20 view, is it solely as a plasticizer or is it a volume
21 enhancer, or what are the uses of this product?

22 MR. BIAGETTI: What the expert reports will
23 tell you is that it was used as a plasticizer, a
24 drying agent and as a low cost extender. All three.

25 THE COURT: Okay. What do you say to this

1 evidence about the testing that was done of some of
2 the barrels that showed very high concentrations of
3 things like TCE?

4 MR. BIAGETTI: It was not done of any of the
5 barrels that were sent to Fletcher. There's one
6 letter that they're relying on and --

7 THE COURT: These are barrels before they
8 left your site?

9 MR. BIAGETTI: No. These are barrels which
10 Mr. Clark -- who is traveling to testify for you on
11 Thursday morning. Mr. Clark had barrels of what he
12 called at the time similar material tested by
13 Monsanto. He gets a complaint for the very first time
14 from Fletcher in February of '68 regarding quality.
15 First time ever. He had talked with him two weeks
16 before. Fletcher hadn't made a peep. He gets a
17 letter that says, we have some quality issues, and
18 we'll go through -- not now, Judge, but when the
19 letter comes up -- all the ways that Fletcher was
20 saying in that letter are defied by the record
21 evidence, but Mr. Clark, in an effort to continue to
22 cultivate his valued customer, he wants Fletcher to
23 keep on buying.

24 Clark has a test done by Monsanto of similar
25 material. Not a drop that was tested was what was at

1 Fletcher. Not a drop. And based on that he decides
2 that it is at least possible that Fletcher has a
3 legitimate claim that some of the barrels are not of
4 the highest quality that GE had been providing, and
5 he's going to explain all of this to you, but he and
6 Abbe, his boss, make a reasoned business decision that
7 rather than send their own chemist all the way to New
8 Hampshire and rather than spar with their valued
9 customer, that they are going to recommend a write-off
10 to continue to cultivate his buying and using, and
11 there is evidence that it worked.

12 Mr. Hooper will testify that he recalls
13 making pick-ups at Fletcher for as much as -- for
14 Fletcher at GE for as long as six years. After that
15 back and forth on the write-off, that Fletcher
16 continues to buy and use. Whether or not he did, that
17 was the state of mind of Clark and Abbe, and they will
18 explain it to you in their own words.

19 THE COURT: All right.

20 MR. BIAGETTI: Your Honor, I want to talk for
21 a minute about the graphic, and thank you. The
22 government is going to help me put it back up.

23 THE COURT: Do you want one of the computers
24 enabled, or do you want the document camera enabled?

25 MR. BIAGETTI: I want to put up one of

1 their --

2 THE COURT: Are you going to put it on the
3 document camera or --

4 MR. BIAGETTI: We actually have the
5 electronic version up. Thank you. It's the
6 destination graphic.

7 THE COURT: Yeah. Hang on a second. I
8 pushed the wrong button. Okay.

9 MR. BIAGETTI: Thank you. I wanted to
10 correct one point about what the evidence will show,
11 thanks to Mr. Cowan.

12 Mr. Hooper will testify about the fact that
13 Webster paid two different prices. It's the record
14 evidence, the documents, that will establish that it
15 was Fletcher who, in turn, paid two different prices
16 to GE. I may have misspoken about the second half of
17 that.

18 When you look at this graphic, Judge -- I'm
19 sorry. It's the other one. Thank you very much.
20 When you look at this one, the first problem that we
21 have with it is this becomes contaminated during the
22 manufacturing process. I won't spend a lot of time on
23 it, but as I mentioned, there was no contamination in
24 the large measure of -- the Pyranol that GE could not
25 use. As little as --

1 THE COURT: If it doesn't become
2 contaminated, you could continue to use it.

3 MR. BIAGETTI: Even if it was somewhat
4 contaminated in one cycle, it was run through the
5 fuller's earth again and could be used again. We've
6 got the chemical technician for GE at the time,
7 through deposition testimony, who is going to tell you
8 as little as 30 parts per million would make it
9 unsuitable for GE's use. So if that's contamination,
10 so be it. The proper term there, obviously, is
11 unsuitable for GE's use.

12 GE had tremendously high standards because
13 these capacitors could cease up with as little as 30
14 parts per million of water or anything else in them.

15 Secondly, and I referred to this already, but
16 this removed by scavengers for out of sight, out of
17 mind disposal -- 1970 document talking about Pyranol
18 from manufacturing sites and service shops. Not just
19 Hudson Falls or Fort Edwards. This will happen
20 throughout -- I respectfully submit -- the
21 government's case.

22 There's no evidence that we're talking about
23 what GE sent from Hudson Falls and Fort Edward to Mr.
24 Fletcher. There will be evidence at various times
25 about drums that are at Fletcher, but they may well

1 have come from Sprague or Aerovox, not necessarily GE
2 or GE Hudson Falls and Fort Edwards.

3 THE COURT: Sprague Electric, you're talking
4 about?

5 MR. BIAGETTI: Sprague Electric and Aerovox.

6 THE COURT: I used to represent Sprague
7 Electric years ago, but I don't think I did anything
8 in connection with this site.

9 MR. BIAGETTI: I think we've got one Sprague
10 witness by deposition designation, and about the only
11 thing he's going to say is that he had no quarrel with
12 the testimony of GE witnesses that you're going to
13 hear from today.

14 THE COURT: All right.

15 MR. BIAGETTI: One point is significant in
16 terms of Sprague and in terms of what Fletcher was
17 doing in value. Sprague sold to Fletcher at higher
18 prices. I think \$5.00 will be the evidence. Fletcher
19 had an appetite for this stuff. He was buying it from
20 three different sources. He was buying it even at
21 higher prices when he couldn't get enough from GE; and
22 finally, when he did have on occasion enough from GE,
23 Mr. Clark will testify, he told him, I can't use
24 anymore at this time. In the future if I have a use
25 for more, I'll come pick it up. That's what GE heard

1 that he was using, and that the only curb on how much
2 they could sell him was not what they could unload to
3 him. It was what he could buy and use.

4 Lastly -- not lastly. Two others on this
5 chart. Again, when we're talking about what was
6 applied to the ground and spilled on the ground, not
7 necessarily the Pyranol from GE. It may have been.
8 No evidence that it is.

9 The biggest point, I think, about this chart
10 is when we talk about Aroclor at the top coming from
11 Monsanto, where's Monsanto in the government's case?
12 Monsanto sold to GE knowing that GE was purifying for
13 its purpose. There's a stipulated fact that GE's
14 specifications for the Aroclor from Monsanto was
15 higher purity than what Monsanto used it for. Was it
16 not possible, even likely, that GE would spill in its
17 pick-up or use of the Monsanto product?

18 THE COURT: Well, that's the problem with the
19 definition as broad as the Burlington case. It would
20 encompass -- and many people have argued for an
21 alternative to the Superfund law that involves simply
22 taxing the manufacturers of chemicals to address the
23 clean-up costs, but the Superfund did not take that
24 approach and doesn't make liable strictly
25 manufacturers of hazardous substances. It requires a

1 closer connection to the actual disposal, and any
2 large scale manufacturer of any kind of chemical, like
3 TCE, is going to have an awareness that at some point
4 during the life cycle of the use of that product it's
5 going to get spilled from time to time, and if you
6 construe arranger liability to encompass all of those
7 circumstances, you really are making all chemical
8 manufacturers liable, and I think that doesn't appear
9 to be something that CERCLA intended. That's the
10 problem with the Burlington reasoning, I think.
11 Hopefully the Supreme Court will clarify. It's just
12 not a problem I have to deal with.

13 MR. BIAGETTI: You have my point, obviously,
14 your Honor, and I bring it up now because I think it
15 helps us to understand where, I believe, based on the
16 proposed findings of fact and what we heard in the
17 opening, the government's case is ultimately going.

18 It's not about whether Fletcher employees
19 were spreading it on the ground for weeds or for dust
20 or whether GE employees were doing the same. If that
21 were enough, Monsanto would be on this chart and
22 Monsanto would be --

23 THE COURT: Well, if we hypothesize a
24 contract between Fletcher and GE in which GE agrees to
25 provide contaminated Pyranol to Fletcher and Fletcher

1 agrees to use it exclusively to spread it on the
2 ground and we actually had that contract here, I think
3 you would be in some big trouble.

4 I do think it does matter, potentially, but
5 it goes to the question of does it establish -- have
6 any tendency to establish that GE was aware that
7 disposal would be substantially certain to result.

8 MR. BIAGETTI: And was it aware at the time
9 that --

10 THE COURT: Right, but if it was discovered
11 three years later that this happened, it's not going
12 to be persuasive evidence.

13 MR. BIAGETTI: That's what I'm finally
14 getting to because if you look at one piece here in
15 the lower right, and it's just a morsel, I think, of
16 what's to come from the government, but what their
17 case, I believe, shrinks to is that there was an
18 abandonment by Fletcher of somebody's drums. We don't
19 know if they were GE's, but there was an abandonment
20 by Fletcher of somebody's drums after the man dies
21 that are found in the '80s, 20 to 30 years after the
22 sales by GE, and your Honor, the evidence will show
23 that that long later fact does not prove by a
24 preponderance intent by GE at the time of the sales to
25 have either arranged for that abandonment or to have

1 been substantially certain of it or, frankly, given
2 the evidence already talked about and what they did
3 know and hear, that it was even a reasonable
4 possibility that that's what was going to happen.

5 THE COURT: Well, by itself abandonment
6 doesn't -- by Fletcher years later doesn't really say
7 much, but it could become relevant or it could not,
8 depending on the circumstances.

9 MR. BIAGETTI: It could become relevant. It
10 could have marginal relevance, but that's really where
11 we are. What we're talking about now. We are talking
12 about drums, which may or may not have been GE's, that
13 are left 20 to 30 years after the transactions at
14 issue, and we respectfully submit that that's pretty
15 tenuous evidence of a present intention to dispose or
16 an awareness that disposal would be substantially
17 certain.

18 Fletcher never returns a single drum and says
19 it's leaky or rusty. He never returns any Pyranol and
20 says, I can't use it for whatever my purposes are.
21 All GE ever sees is him buying and using and paying.

22 A couple of other points. I have one graphic
23 of our own, just to sort through a little bit what I
24 believe the evidence will be about what GE did know
25 and did not know about Fletcher's uses.

1 Respectfully, I think that the government
2 occasionally bunches these bits of knowledge, and it's
3 important to understand the distinction. The evidence
4 will be that GE knew that Fletcher made paint. We
5 have one example from Mr. Abbe: What did you know
6 about Fletcher's operations? Nothing. Except he made
7 paint. But GE did not know how much paint Fletcher
8 made.

9 We've got one example of that on the right.
10 No. So while it may or may not be so that Fletcher
11 was only putting one to five gallons in a batch, GE
12 never knew that, and the folks on those loading docks
13 at Fort Edward and Hudson Falls were not the paint
14 makers for GE at some other spot in the GE empire.
15 All they knew was the man makes paint, and they didn't
16 know how much paint he made.

17 They knew that Fletcher was adding
18 plasticizer to paint. Abbe says, I asked him what he
19 was going to do with it. He said, as plasticizer.
20 He's a paint manufacturer. But Mr. Clark will testify
21 that he didn't know -- GE didn't know how much
22 rubber-based paint Fletcher was making that would have
23 to use such plasticizer.

24 THE COURT: Isn't that a little bit strained?
25 He's not Sherwin Williams. He's a small-time paint

1 maker.

2 MR. BIAGETTI: You're going to hear Mr.
3 Racicot on that subject, among others. This guy had
4 seven or eight stores. He was making paint and
5 selling it, and here's how enterprising he was. Mr.
6 Fletcher's son recalls that his dad was also selling
7 the Webtex product.

8 So he's reselling ingredients to Webster.
9 Webster is making roof coating. Fletcher puts the
10 roof coating in his store, and he's selling all of
11 that, too, so he's making it two ways with Webster.

12 THE COURT: But you only use a very small
13 amount of PCB plasticizer in a gallon of paint, right?
14 I mean you're talking a very small amount.

15 MR. BIAGETTI: Maybe so. Again, I think it's
16 Fletcher, the son, and there may be others who will
17 testify one to five gallons of Pyranol in a batch of
18 the paint that Fletcher was making, but the point is
19 this --

20 THE COURT: So he had thousands and thousands
21 of gallons of Pyranol that he got from you guys.

22 MR. BIAGETTI: And he was selling it
23 thousands and thousands to Webster. GE did not know
24 that. We get to, if you can, the fact that Fletcher
25 sold scrap -- no. One down below that. Fletcher sold

1 scrap to Webster. There you go. When you made your
2 trips to see GE or Aerovox, Sprague, to buy the used
3 Pyranol, did you tell anybody at those companies what
4 Fletcher was making with the Pyranol? I never did.
5 We were told not to. Who told you? Mr. Fletcher. He
6 didn't want GE to know.

7 He, Fletcher, was protecting his resale
8 customer from GE finding out about it, and the GE
9 witnesses will corroborate that they didn't know about
10 the resale so it's important -- can we come back and
11 just talk, again, about a couple of things that GE did
12 know about other uses -- that towns used scrap Pyranol
13 for road oil and dust suppression. The Town of
14 Queensbury. This is firsthand? No. Secondhand,
15 thirdhand, yeah. I heard that over the years that GE
16 was selling to towns for that purpose but not
17 Fletcher. Go to the comparison.

18 THE COURT: Do you really argue that putting
19 down oil on a dirt road is not disposal of oil?

20 MR. BIAGETTI: Well, I think the law makes
21 clear that it is. I do think this is relevant,
22 though. If we're talking about that state of GE's
23 knowledge to inform what GE's state of mind was at the
24 time that it was selling its useful product to
25 Fletcher, then, no, I don't think that you can

1 necessarily say that GE knew in 1953 when it was
2 selling or giving to a drag strip that that was not a
3 productive use by that drag strip or municipality.

4 THE COURT: No, but I think we have to be
5 careful about this. I can't simply interpret the
6 phrase disposal to mean abandonment or waste or
7 anything like that. It doesn't matter what GE
8 understood disposal to mean at the time. It was what
9 did GE understand when it made the arrangement would
10 happen, and if what it understood would happen
11 qualifies as disposal, GE is liable.

12 So in this case if we had a hypothetical
13 contract between Fletcher and GE where GE agrees to
14 sell Pyranol to Fletcher and Fletcher agrees to use it
15 as a dust suppressant on dirt roads or in a parking
16 lot, that would be an arrangement for disposal even if
17 GE thought, that's a good use for our product, we can
18 make money selling it for that purpose. They may have
19 thought it was useful, but it still qualifies as
20 disposal so I think you lose under that kind of
21 analysis.

22 MR. BIAGETTI: We, fortunately, need not
23 reach it because, the evidence will show: Did you
24 ever think Fletcher's might have been using some of it
25 as road oil or dust suppressant? Answer: No.

1 Again, my point is if we look in that upper
2 left hand quadrant of what GE knew, and I ask your
3 Honor -- and I know you will -- to be especially
4 attentive about what the evidence shows on that
5 subject as opposed to what it did not know about what
6 Fletcher was doing or what GE knew that others besides
7 Fletcher might have been doing. A tremendously
8 important distinction.

9 A couple more points. Not only does Mr.
10 Abbe, a key witness here, insist that he had no idea
11 what Fletcher was doing with it at deposition, but you
12 will see a document, which is an interview with Mr.
13 Abbe in 1992 in which the government -- a government
14 interviewer is trying to press him on what he
15 remembers, and Abbe makes clear that he had no idea
16 what the actual use was. Only that Fletcher was using
17 it for some purpose, and he fleshes that out at
18 deposition that he knew Fletcher made paint, the use
19 must have had something to do with paint, but he is
20 consistent throughout that that's all he knew that
21 Fletcher was using it for.

22 Now, Abbe, like anybody at GE, acknowledges
23 that Fletcher could have been doing something else
24 with it. In fact, Abbe is going to say, I was
25 curious. I asked, what are you doing with it, but the

1 only answer he ever got was, buying and using it in
2 paint. Hooper will explain, in part, why. Fletcher
3 didn't want GE to know about this aftermarket, and all
4 that these folks reasonably understood was that
5 Fletcher was picking up, buying, testing, complaining
6 about short loads. Why does a disposer complain that
7 he's not getting enough? It makes no sense in the
8 ears or to the eyes of the seller. That's what GE saw
9 and heard here. It's the antithesis, respectfully,
10 Judge, of willful blindness.

11 GE did inquire. GE did watch. GE did see.
12 GE did ask. And all they ever heard in return was,
13 I'm picking up, I'm selecting, I'm rejecting what I
14 don't want but I'm leaving it at GE, and when you give
15 me something that I don't want, I'm going to complain
16 and argue for a better price.

17 THE COURT: We've talked in the past about
18 willful blindness. Just as a theoretical measure, I'm
19 not anticipating there's going to be an argument or
20 evidence about willful blindness.

21 MR. BIAGETTI: I don't think so.

22 THE COURT: Most of the time this was
23 happening it was perfectly legal for GE to just take
24 it out in the back woods and pour it into the ground.
25 It didn't need to be willfully blind until many years

1 later.

2 Willful blindness comes into play when people
3 have a strong risk that if they know certain things,
4 they're going to incur certain costs or incur certain
5 penalties and they take active steps not to know, but
6 back in the '50s, '60s, I'm not aware that GE would
7 have been doing this surreptitiously. They're just
8 trying to get rid of the stuff. Doesn't need it.
9 Doesn't want it. Needs to get rid of it. What's the
10 best way to get rid of it? If I can get somebody to
11 pay me for it, that's better than me doing it on my
12 own, and I just want to be rid of it.

13 MR. BIAGETTI: You will see a memo -- I
14 believe it's either from or to Mr. Abbe from 1968,
15 right in our time frame, where he talks about whether
16 or not scrap Pyranol should be disposed of by our --
17 something like -- usual landfill operations.

18 THE COURT: Well, many of these -- I don't
19 know what Monsanto recommended, but many of these
20 chemical companies actually recommended disposal by
21 digging a trench and pouring it into the ground in the
22 '50s. That was the accepted industry standard
23 practice for getting rid of a lot of these chemicals.

24 MR. BIAGETTI: We certainly know that at the
25 time GE was paying an outfit called Caputo serious

1 money to make some disposal in landfills.

2 THE COURT: I grew up in the '60s near W.R.
3 Grace, and one of our favorite things as kids was to
4 go out to the back woods behind the W.R. Grace plant
5 and throw rocks in the pond with the various colored
6 water because it was so pretty with the green water
7 and the red water, and they had big, giant retention
8 ponds out in the woods. That's the way they did it
9 then.

10 MR. BIAGETTI: You are going to hear Mr.
11 Racicot, who worked for Fletcher and lived across the
12 street from the Fletcher plant where drums were piled
13 up, say that his kids used to climb on the drums and
14 he was worried about them but not because of their
15 contents. He doesn't know what was in there. He was
16 worried they were going to fall off.

17 THE COURT: We also used to run behind the
18 mosquito sprayers spraying DDT. I mean that's what
19 you did in the '60s.

20 MR. BIAGETTI: I have one more point, your
21 Honor, and then we will get on with it. We get,
22 finally, to what my brother talked a little bit about,
23 which is this business decision in 1968 to recommend
24 the forgiveness of the debt.

25 There is no evidence that the debt, itself,

1 was ever forgiven by GE, but there is absolutely a
2 recommendation by Mr. Clark, and he's going to be
3 here, as I said, to explain it to you, but your Honor
4 said something at summary judgment when you were
5 indulging inferences, about GE let a receivable
6 languish for a while, and the evidence will be to the
7 contrary. When Fletcher was slowing on payment, GE
8 went after him, just like they would any customer, and
9 we have, for example, up here one of our exhibits --

10 THE COURT: Do you want it on the document
11 camera?

12 MR. BIAGETTI: Yes. Can we take the graphic
13 off and put this one on? Thank you. This is from
14 1957. It's a capacitor department receivables ledger,
15 and you can see that the "A" refers to the debt of
16 Fletcher, if I can get that on there right. Then we
17 have the Milford Paint Works and they owe 196 bucks,
18 and what the receivables department says at the bottom
19 is, letter sent requesting check. So GE was vigilant
20 about debts from Fletcher right from the beginning of
21 the relationship all of the way to the end.

22 If he ever got behind -- there was a shipping
23 slip every time he took something out. That became a
24 bill of lading that he had taken it away. That was
25 sent to the receivables, the accounts department, and

1 he was billed, and if he didn't pay, that receivables
2 department let folks at the capacitor department know.
3 Mr. Clark will go through all of that for you, but it
4 is so that in '68 he's behind.

5 When he got to \$6,000 behind, they -- GE
6 sends him a dunning letter in August of '67. Clark is
7 going to tell you that, yeah, Clark was in the
8 accounts department. Clark is on the dock, and he
9 wants to continue to sell to his valued customer so
10 he's getting it from both directions. The accounts
11 department is saying, this guy owes 6,000 bucks. Do
12 your best to get it collected. Clark's boss, Abbe, is
13 saying, can you encourage Fletcher to buy some more.
14 So Clark calls him up. Clark calls him up, and he's
15 going to say, I mentioned the receivable, but I didn't
16 push it. I wanted him to continue to use and buy and
17 Fletcher says, "I can't use any right now, but I will
18 let you know."

19 The next thing you know Clark is surprised to
20 receive the letter from Fletcher. It's filled with
21 posturing. He's a bargainer, Judge, and he is trying
22 to bargain for a lower price on what he's got in the
23 same way that he had in years past. In that whole
24 letter -- and we're going to go through it when it
25 comes in -- he never says that he wants to return any

1 of it and he never does, and in fact, among the
2 telling things he does say is that everything was
3 going perfectly until your man -- GE's man started to
4 ship to Fletcher. When your man started shipping, GE
5 added everything under God's green earth.

6 Judge, the evidence unanimously is that only
7 Fletcher trucks or Fletcher's contractor ever went to
8 GE. It could well be that Fletcher got trucks from a
9 man from Sprague or Aerovox but not GE, and that is
10 only one of the several reasons why when Clark reads
11 the letter, he doesn't for a minute believe that
12 anything that Fletcher has cannot be used by Fletcher,
13 but he makes a decision with his superior to recommend
14 a write-off at that time based on the cost it would
15 have taken to challenge Fletcher and the risk that
16 Fletcher would not continue to use or buy.

17 There is evidence not only that that was the
18 state of mind of Clark and Abbe when they made that
19 decision, but also that it worked. That Fletcher,
20 their valued customer, continued to use and buy after
21 that.

22 So again, the evidence will show that at the
23 time of the sales by GE to Fletcher, GE knew, had
24 knowledge and a reasonable expectation that Fletcher
25 would only use what he had. That is borne out, the

1 evidence will show, by what Fletcher actually did with
2 GE's drums, and the forgiveness of the debt is no
3 evidence -- is no -- does not reach a preponderance of
4 the evidence that GE, when it forgave that debt, was
5 substantially certain that some drums that Fletcher
6 may have had from GE at that time would 20 years later
7 be abandoned by Fletcher.

8 THE COURT: All right. Are we ready to go
9 with the evidence?

10 MS. FISKE: Yes, we are, your Honor.

11 THE COURT: I know you would like for me to
12 have to make that kind of connection, that they
13 intended that the drums that were eventually found on
14 the site would be disposed of, and that's a leap too
15 far. That's not what's required. All right. Do you
16 want to call your first witness, please?

17 MS. FISKE: Yes.

18 THE COURT: I'm only going to go until 12:30.
19 We'll take a break at 12:30.

20 MS. FISKE: All right. Let's start. That's
21 a good idea.

22 THE COURT: Come right up here, sir, and walk
23 around to this witness stand right here, and stand
24 right there and the clerk will swear you in.

25 MR. BIAGETTI: Judge, for the record, while

1 we're waiting, I only addressed one of the two
2 government's graphics in my opening. For the record,
3 I do object to this use of the second one, as well.

4 THE COURT: Okay.

5 WALLACE HOOPER

6 having been duly sworn, testified as follows:

7 THE CLERK: Would you please state your name
8 for the record?

9 MR. HOOPER: Wallace Hooper.

10 THE CLERK: Spell your last name, please.

11 MR. HOOPER: H-O-O-P-E-R.

12 THE COURT: Sir, we're just going to have a
13 few questions for you, and then we're going to have to
14 break for lunch and you will have to come back after
15 lunch. Go ahead, counsel.

16 DIRECT EXAMINATION

17 BY MS. FISKE:

18 Q. Good afternoon, Mr. Hooper.

19 A. Good afternoon.

20 Q. After high school, what was your first job?

21 A. I went to work for Mr. Fletcher.

22 Q. How long did you work for Mr. Fletcher?

23 A. I worked for Mr. Fletcher or for the
24 companies that he owned till I had a heart attack in
25 '87.

1 Q. So that's over 40 years?

2 A. I graduated in '43. Yeah. Yes.

3 Q. What type of work did Mr. Fletcher do?

4 A. Well, he raised potatoes and chickens during
5 the Second World War.

6 Q. Is that what you started out doing for him?

7 A. Yes.

8 Q. Was he a farmer?

9 A. A farmer?

10 Q. Yes.

11 A. Well, not really, I wouldn't say, but he did
12 that.

13 Q. What else did he do?

14 A. Well, he ran the Embassy Chemical Products in
15 Boston.

16 Q. Anything else?

17 A. Well, he dabbled in other things -- in
18 anything he could make a little money on.

19 Q. How many different companies would you say
20 that he ran -- let's focus on the time period of the
21 '50s to the '60s?

22 A. Oh, many. He went under many names.

23 Q. And what did they do?

24 A. Well, the Embassy Chemical Company was a
25 manufacturing concern that made duplicating supplies,

1 such as duplicating inks, duplicating stencils, soap
2 for cleaning your hands, hectographs, photographic
3 supplies.

4 Q. Any other companies that he was involved in
5 in the '50s and '60s?

6 A. Oh, several.

7 Q. Can you list those for us?

8 A. He had a lumber concern. He had Fletcher
9 Lumber Construction, Souhegan Valley Paper Company,
10 the Chambeau (ph.) Perfume Company.

11 Q. Anything else?

12 A. Well, he dabbled in many businesses, I would
13 say.

14 Q. What about a paint company?

15 A. He bought the old Milford Paint and
16 Manufacturing Company.

17 Q. And did you say that was in Milford?

18 A. In Milford, yes.

19 Q. And where was that located?

20 A. It was located on Elm Street in Milford.

21 Q. Did you work for him at that location?

22 A. Yes.

23 Q. When did you start working for him there?

24 A. Well, he moved the duplicating supply
25 business from Garden Street to the paint mill -- to

1 the paint site building. I'm not sure just what year.

2 It must have been in the late '40s.

3 Q. And that was when you started working for him
4 there?

5 A. At that location, yes.

6 Q. And when did that location move to Mill
7 Street?

8 A. Well, he bought property at Mill Street.

9 Q. I'm sorry. When did that location -- when
10 did he -- when did you start working at Elm Street?

11 A. Well, he moved the duplicating concern there.
12 I'm not sure. I think it was in the late '40s
13 sometime.

14 Q. And then you said he later on bought property
15 at Mill Street?

16 A. Yes.

17 Q. Do you remember when that was, approximately?

18 A. Well, I would guess in the early '50s
19 sometime. I'm not sure.

20 Q. And what was the connection between the Elm
21 Street and the Mill Street properties that Mr.
22 Fletcher owned?

23 A. Well, he used the Mill Street property for
24 storage of barrels -- the building -- the big ones and
25 cans and things.

1 Q. So he used the Mill Street property as
2 storage for materials that were related to the
3 business that he was running at Elm Street; is that
4 right?

5 A. Yes.

6 Q. Okay. So for purposes of today's
7 questioning, I'm going to refer to the operations that
8 Mr. Fletcher was running out of Mill Street and Elm
9 Street in the '50s and '60s and beyond as Fletcher's.
10 Is that all right with you?

11 A. Yes.

12 Q. Okay. I would like to show you a diagram
13 that's marked for identification as U.S. Trial
14 Exhibit 30.

15 MS. FISKE: Judge, can I switch the camera,
16 please? Thank you.

17 Q. Do you recognize this diagram?

18 A. Yes.

19 Q. What do you recognize this diagram to be?

20 A. Fletcher's property at Mill Street, 111, I
21 believe it says, and the property on Elm Street. This
22 is -- he went to the Mill Street property and then
23 went back.

24 MS. FISKE: I would like to move to enter
25 this as U.S. Trial Exhibit 30.

1 MR. COWAN: No objection, your Honor.

2 THE COURT: Without objection.

3 (Government's Exhibit No. 30 admitted)

4 Q. I would like to go back to discussing what
5 types of activities Mr. Fletcher was conducting on the
6 Elm Street portion of the site that we were looking
7 at. Can you describe in a little more detail the
8 different types of activities that Mr. Fletcher
9 conducted at Elm Street?

10 A. As I mentioned, he purchased the old Milford
11 Paint Manufacturing Company. I believe he purchased
12 it from the banks because the company had gone
13 bankrupt, and he moved the duplicating supply business
14 from Garden Street to that location until he sold that
15 business and left the building.

16 After that he manufactured paint, and at the
17 store there sold paint and wallpaper and all those
18 type of things.

19 Q. Did he manufacture anything else besides
20 paint at that location?

21 A. I can't recall that he did.

22 Q. What about driveway dressing?

23 A. Well, driveway dressing, yes. I always
24 called that a type of coating.

25 THE COURT: What is a driveway dressing?

1 THE WITNESS: A driveway dressing -- he
2 brought in barrels of -- I think it was called
3 Gilsonite. It was black, and it had to be dissolved,
4 and he set up -- he couldn't do that inside the
5 building because of the smell that it created -- the
6 odor. It had to be broke down with a product called
7 VM & P. After it was broke down with the VM & P the
8 driveway -- the old thinners that we had that had
9 mounted up over the years could be used to thin it.

10 THE COURT: I'm just asking -- I'm sorry I
11 don't understand this stuff. Driveway dressing -- is
12 it like that black stuff you put over a driveway?

13 THE WITNESS: Yes.

14 THE COURT: Okay. Thanks. Go ahead.

15 Q. For his manufacturing operations did he
16 acquire raw materials?

17 A. Yes.

18 Q. Were those raw materials always new
19 materials?

20 A. Always new materials?

21 Q. Yes.

22 A. No.

23 Q. Can you describe the types of materials that
24 he might acquire that were not new?

25 A. Well, he purchased obsolete chemicals or

1 something like that, resins from other companies,
2 pigments from other companies and oils.

3 Q. When he purchased these types of materials
4 that you've just described as obsolete chemicals for
5 resins, pigments and oils, did he ever buy any of
6 those with the intention not to use them in paints but
7 maybe for some other purpose?

8 MR. COWAN: Objection.

9 A. Well, yes.

10 THE COURT: I'm sorry, sir. How do you know
11 that?

12 THE WITNESS: Well, I'm trying to think of
13 things he might have bought that he didn't use in
14 paint.

15 THE COURT: Let me just ask -- this is
16 something the lawyers need to do. Establish that the
17 person has a basis for knowledge before you elicit the
18 information. So you might ask him, did you ever see
19 him use chemicals on-site for some purpose other than
20 paint, something like that. You need to establish
21 that the witness knows what the witness is about to
22 testify about because I don't expect him to be
23 limiting his answers in that way. Non-lawyers don't
24 even understand that.

25 MS. FISKE: Yes, your Honor.

1 Q. Can you think of any other examples of
2 materials that he bought that were not new?

3 A. At Paint Works?

4 Q. Yes.

5 A. Well, I remember he bought mustard pots from
6 the government and used them, you know, to put ginger
7 in with fancy labels and sold them. I believe that
8 was after he had the paint company.

9 Q. Let's switch gears now to Mill Street. What
10 did he use -- I think you mentioned earlier that he
11 used the property at Mill Street for storage. What
12 type of material was stored at Mill Street?

13 A. Well, in the larger building he used to store
14 a lot of pigments because he used to get different
15 pigments like whitening titanium and things by freight
16 car and we could put a set of rollers -- the building
17 was close enough to the railroad so that you could put
18 a sell of rollers on the freight car down to the
19 building and unload it. He kept a lot of pigments
20 there and at times we had empty cans there, and I know
21 he occasionally stored resins outside in barrels.

22 Q. What about off-spec material? Did he ever
23 get any of that?

24 A. Yes.

25 Q. Can you give me some examples?

1 A. Well, one thing, I believe, that was off-spec
2 was Pyranol.

3 Q. Anything else?

4 A. Well, there may have been other things
5 because he used to buy chemicals in sometimes.
6 Probably some were. I know he bought resins and
7 things that had been through fires and things
8 sometimes and pigments and things, too.

9 Q. Can you tell me about the resins that had
10 been through the fire?

11 A. Well, we had a lot of the acrylic resins at
12 one time that had been through a fire. You could tell
13 by the drums they had them in. We used most of it.
14 Some of it was bad.

15 Q. What happened to the bad part?

16 A. Oh, I don't recall now. Back in those days a
17 lot of times you could take stuff to the town dump and
18 nobody said anything.

19 MR. COWAN: Objection, your Honor. Move to
20 strike the last half.

21 THE COURT: Overruled.

22 Q. What were your jobs working at Fletcher's?

23 A. Oh, I did a little of everything. I worked
24 in the paint factory, mixed paint, drove the truck at
25 times. Anything that needed to be done.

1 Q. You mentioned the term Pyranol earlier. When
2 was the first time you heard the term Pyranol?

3 A. I'm not sure. I know that I heard it called
4 Pyranol when he started to go get it. I'm not sure if
5 I heard it called that before or not.

6 Q. When was the first time that Fletcher's
7 obtained Pyranol from GE?

8 A. Well, he got several loads. I'm not sure
9 just -- it would have been the early '50s somewhere --
10 I'm not exactly sure of the year -- and they were
11 trailer truckloads.

12 Q. What were trailer truckloads?

13 A. Barrels of Pyranol was delivered that way.

14 Q. And what size barrels?

15 A. 55 gallon drums.

16 Q. And it came by trailer truck, is what you're
17 saying?

18 A. Yes.

19 Q. Whose trailer trucks?

20 A. As I recall, they had the GE name on them.

21 Q. And how do you know that?

22 A. Well, I remember seeing the trucks and I
23 remember talking to the drivers. They used to come in
24 and eat with us in our lunch room.

25 Q. How many drivers were there that you were

1 talking to?

2 A. Oh, I don't remember now.

3 Q. Was it more than one?

4 A. I'm not sure. As I remember, they came one a
5 day spread over a few days. So I'm not sure if it
6 was -- there may have been more than one.

7 THE COURT: Sir, we're going to take our
8 break for lunch now. Can I ask you, though, before we
9 do, about how many barrels would there be in a
10 truckload of this stuff?

11 THE WITNESS: Well, it depended on the truck
12 we used.

13 THE COURT: When you're talking a trailer
14 load, what are we talking about?

15 THE WITNESS: I don't remember how many there
16 were in a load of those.

17 THE COURT: When we talk about a trailer, can
18 you give me a sense of what the size of this trailer
19 is?

20 THE WITNESS: Oh, one of these that you
21 call -- what is it -- that they call 18 wheelers or
22 something.

23 THE COURT: So one of these big, long trucks
24 that you see on the highway carrying product or
25 equipment, but one of the longer kinds of trucks that

1 you could see?

2 THE WITNESS: As I recall, yes.

3 THE COURT: Okay. All right. Thanks. Let's
4 take a break. We'll come back at 1:30.

5 (Recess)

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9 C E R T I F I C A T E

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11

12 I, Susan M. Bateman, do hereby certify
13 that the foregoing transcript is a true and accurate
14 transcription of the within proceedings, to the best
15 of my knowledge, skill, ability and belief.

16

17

18 Submitted: 2-10-09 /s/ Susan M. Bateman
19 SUSAN M. BATEMAN, CSR, RPR, CRR

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